IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 3

J. B. HUTTON, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MRS. R. G. HUTTON; MRS. ROSALIND GWIN HUTTON JOHNSON; AND MRS. MARY HUTTON McCUTCHAN, *Petitioners*,

vs.

S. D. G. HUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUMMARY REMAND FOR TRIAL OF DEFENSIVE ISSUES PRETERMITTED BY CHANCELLOR, OR FOR CERTIORARI AND ARGUMENT; TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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S. D. G. HUTTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUMMARY REMAND FOR TRIAL OF DEFENSIVE ISSUES PRETERMITTED BY CHANCELLOR, OR FOR CERTIORARI AND ARGUMENT; TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a writ of certiorari be issued to review an anomalous judgment of the

Mississippi Supreme Court, for specific performance, fatally defective because made without required findings at trial of facts that a contract had been created, without required findings at trial on other pleaded, defensive facts, and without supporting evidence, and which reversed a decree of the Chancery Court of the County of Holmes, Mississippi, in favor of the Petitioners, dismissing respondent's bill for specific performance of an alleged agreement to sell land; and Petitioners pray that at the same time the case be summarily remanded for trial of defensive issues not reached or tried by the Chancellor, to correct flagrant denial of Due Process apparent on the face of the record, in the light of *Saunders* v. *Shaw*, 244 U.S. 317 (1917), *Kelley* v. *Everglades Drainage District*, 319 U.S. 415 (1943), and other cases (digested pp. 38, 39, below).

The opinion and decree of the Chancery Court of the said County of Holmes appears in the record at pages 398-406 and 407-410, and the opinion is printed at pages B-1—B-9 hereof. The opinion of the Supreme Court of Mississippi in this case appears in the record at pages 424-440, is printed in 119 Southern Reporter, 2d, 369, and in this petition at pages B-10—B-25; and contains the order to enter a decree of specific performance for Respondent, and judgment thereon (R. 441). The final orders of the State Supreme Court, of reversal, and denying Petitioners' motion for rehearing or remand for trial of issues pretermitted at trial when decree for Petitioners was given, appear at pages 441, 487 and 497 of the record and B-26 and B-27 below.

STATEMENT OF STATUTORY GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

April 4, 1960, was the date of the decision reversing the Chancellor's decree for Petitioners (R. 424, 441) and of the order to remand the case for entry of a decree of specific performance for Respondent, in pursuance of the said order.

May 2, 1960, was the date of the order overruling the Petitioners' Suggestion-of-Error and Implementing Motions, which raised Federal Due Process questions (R. 487). And July 11, 1960, was the date of the order overruling Petitioners' motions for leave to file motion to reargue the Due Process right to remand for trial of pretermitted defensive issues on which special findings were requested, under Rule 33 of the State Supreme Court (R. 497).

Statutory authority for review by the Court on certiorari is given in Section 1257(3), Title 28 U.S.C., as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * when any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

QUESTIONS AS TO RELIEF SOUGHT AND DUE PROCESS PRESENTED FOR JUDICIAL REVIEW.

I. Denial of Procedural Due Process by Refusal of Remand for Trial in Chancery Court of Defensive Issues Pretermitted by Chancellor in Giving Decree for Petitioners (Defendants in Trial Court).

The Petitioners seek relief by certiorari and summary remand for trial of their defensive issues of fact, as pleaded in their answer (denying that a contract had been created and alleging Respondent's conduct had been misleading and inequitable)[1] which have not been tried or disposed of in the trial court,[2] but were decided in the State Supreme Court, an appellate court having no authority thus to try fact issues *de novo*.[3]

Hence, the Petitioners suggest that the first question for review reduces to:

Whether on this record such manifest denial of procedural Due Process is shown as to call for certiorari and summary remand for trial of the pretermitted defensive issues (in the light of *Saunders* v. *Shaw*, *supra*, *Kelley* v. *Everglades Drainage District*, *supra*, and cases on basic liberty of contract and property rights, cited at page 45 hereof) in order that the fundamental rights of the Petitioners may be preserved to have a trial of defenses pleaded, not decided by the Chancellor as Trier of Facts,[2] but improperly decided *de novo* (on a record restricted to

1 See p. 19 below.

2 See p. 29 below.

3 See p. 30 below.

only part of the case)[1] by an appellate court which has no power under the State Constitution to try fact issues *de novo*; and

Under the Constitution of the United States, and the legal order of Due Process thereby established, binding the Judges in every State, may a State appellate court shift ground of decision to an untried fact-issue,[2] and thereby arbitrarily deprive defendants of a trial of their defenses?

Or, in the alternative the question is whether this case is a useful precedent for a full opinion of the Court, applying to special-findings procedures in equity the requirement of Due Process that defendants must have a trial of their defenses (recognized in such cases as the present in *Saunders* v. *Shaw*, *supra*)

In sum, in such case as the present one in which special findings on defenses are required, are pretermitted, and the appellate court shifts grounds of decision and usurps the power of a trial court and decides a case on a restricted record, will this Court protect the defendants' rights to Due Process?

In concrete form the questions are:

Right to Trial of Defenses.

Where

(1) In an action for specific performance of an alleged contract to sell land the property owners are the Peti-

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1. See p. 30 below.
2. See p. 30 below.

tioners; and the Petitioners plead operative facts showing no contract was created, that the Respondent misled and mistreated them in an inequitable manner, and the Petitioners ask the Chancellor to make special findings of fact and conclusions of law on these defensive facts which were summarized as the seven defensive issues of the case, in the manner provided by statute for such pleadings;

(2) The Chancellor exercises his discretion to rest a decree for Petitioners on a part of only one defense pleaded (No. 2 of the findings-request in the answer, quoted at page 21 hereof), omits findings on the remaining six defenses and on two parts of the other defense, and expressly states that a finding on Respondent's inequitable conduct as alleged by the Petitioners is not necessary in giving a decree for the Petitioners, because he found Respondent's purported acceptance was a counter-offer (as alleged in substance in defense No. 2, above); and also excluded competent evidence offered to prove said defenses;

(3) But the State Supreme Court reverses the Chancellor on his ground of decision, leaves the other requests for findings of fact issues by the Chancellor unsatisfied and undisposed of, and finds by a *de novo* decision exceeding the Court's appellate power on a restricted record omitting competent evidence for Petitioners that the Respondent's conduct was equitable, and overruled the Petitioners' motion for a trial *de novo* in the proper court of the said untried defenses;

Then

The question is whether this appellate judgment arbitrarily denies a trial and hearing of Petitioners' defenses to the suit, and so denies procedural Due Process of Law to the Petitioners.

Right to Object to Exclusion and to Have Opportunity to Introduce Defensive Evidence.

Also,

Where gross error in excluding material evidence[1] offered in defense by Petitioners is rendered harmless at the trial because the decree was for the Petitioners and they cannot object to such exclusion in the appeal from said decree, but on appeal the decree for Petitioners is reversed, findings on the issues are made *de novo*, the Petitioners are taken by surprise and move for remand for a trial on the issues with opportunity to introduce evidence but this motion for a fair trial is overruled,

Then,

The question is whether Petitioners have had a fair hearing with opportunity to introduce evidence as required by Due Process of Law under the Constitution of the United States.

II. Denial of Substantive Due Process.

Liberty of Contract and Property.

Where the record, such as it is, shows that the finding of the State Supreme Court (that Petitioners made an unconditional offer and the Respondent made an unqualified acceptance, and that the Petitioners repudiated their agreement) is without any supporting evidence, and contradicts undisputed written evidence of and vetoes strict conditions annexed to the Petitioners' offer to negotiate,[2]

Then,

The next question is whether the finding nullifies the liberty and power of making conditions precedent to open-

1 See p. A-6 for exclusions of evidence.

2 See pp. 44-45 below.

ing negotiations and precedent to divesting Petitioners of their property and vesting rights in Respondent, and so strips them of liberty and property contrary to substantive Due Process of Law.

Questions for Review in Detail.

The questions for review at length are, in detail:

ARBITRARY DECISION UNSUPPORTED BY EVIDENCE; DENIAL OF BASIC CONSTITUTIONAL RIGHTS.

Involved in the case are the following factual questions of fundamental rights arbitrarily violated by the decree of the State Supreme Court:

1. VETO OF CONDITION PRECEDENT TO NEGOTIATION.

Whether under the undisputed (although incomplete) documentary facts of the case, and undisputed testimonial evidence, the State Supreme Court arbitrarily refused to give effect to Petitioners' requirement that Respondent make written retraction of and expression of regret (for public, unprintable insults to one of the Petitioners, his Sister, and to a Brother, not a party to this case) before negotiations should open, and has given effect to an attemptive acceptance sent before apology made.[1]

2. PETITIONERS' RIGHT TO NEGOTIATE FOR FAMILY SETTLEMENT STOPPING LITIGATION OF FRIVOLOUS CLAIMS.

Whether the State Supreme Court arbitrarily held, (1) that Petitioners had no right to ask as a condition of the Family Settlement that the Respondent discontinue his litigation claiming title for his Daughter on the untrue

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[1] See pp. 26-28 and 30 below.

allegation that she alone was named and known in this Family as "Rosalind Gwin Hutton", and (2) that Petitioners had no right to defend on the ground pleaded that Respondent misled Petitioners by inequitable conduct and representations into thinking that he accepted the decree establishing Mrs. Johnson's title as devisee under the name "Rosalind Gwin Hutton", and held arbitrarily (3) that the Respondent's conduct in this matter was equitable.[1]

3. VETO OF ACTUAL PAYMENT AS CONDITION PRECEDENT TO CREATING RIGHTS IN RESPONDENT.

Whether the State Supreme Court arbitrarily has refused to give effect to written conditions that actual payment of the proposed price was the only condition on which the Respondent should receive any rights in or to the property of the Petitioners, which conditions were made before negotiations opened.[2]

Whether this is a denial of the basic liberty of contracting on reasonable conditions only, and is contrary to Due Process.

In short, did the State Court action arbitrarily deny bargaining power and liberty of contract to the Petitioners?

4. ARBITRARY FINDING OF EXECUTORY CONTRACT TO SELL LAND.

If the present case is treated at length, whether the finding of the appellate Court (1) that the Petitioners gave Respondent the right to accept by a letter promising to pay cash (as distinguished from accepting by the act of paying cash), and (2) that a promise to deliver cashier's

1 See pp. 26, 27, 30, A-14, A-24, B-24 and B-25 below.

2 See pp. 26, 30 and B-18 below.

checks operated as an acceptance binding the Petitioners, is an arbitrary deprivation of property unsupported by evidence, is a *de novo* finding on appeal in a case in which the issue had not been tried and found in the trial court, and in which the intent of the parties had not been developed by competent evidence offered by Petitioners and admitted in evidence, and, therefore, whether this said finding should be reversed and the finding of the Chancellor reinstated (that cashier's checks were not cash as called for in Petitioners' March 2 letter), or whether the said issue should be remanded for trial *de novo* both as to the intent of the parties (1) to enter an executory or to enter an executed contract, and (2) as to the required medium of payment, and for the required findings thereon by the Chancellor, who has exclusive jurisdiction to make findings of fact *de novo*.[1]

5. Consistent Standards of Construction.

If the present case is treated at length, whether Respondent's letter of March 6, 1957, alleged to be an acceptance, was correctly construed by the State Supreme Court as an unqualified acceptance of Petitioners' proposals to negotiate; or whether this issue should be remanded for trial *de novo*, on consistent standards of construction, unlike the present State opinion and decision which is liberal in construing Respondent's letter of March 6th[2] and strict and far-fetched in construing Petitioners' letter of March 2, 1957,[3] on proposed terms. Even apart from the context of the series of letters, whether the language of the March 6th letter shows a qualified acceptance, viz., ("*This* is to acknowledge receipt of your letter of March 2, 1957."

1. See pp. 41, 44 below.
2. See R. 462-463.
3. See R. 451-452

"I hereby accept your offer as set forth in *this* letter." Then follows Respondent's counter proposal.) (Italics added) (R. 243, 244).

6. Arbitrary Presumption.

On the present record (see pp. A-6—A-8, Appendix A for documentation) the Chancellor excluded all of Petitioners' evidence showing that the intent of the two letters of March 2, 1957, was to express a willingness to accept apology for and to overlook gross insults, and only then to open negotations for a cash sale, without obligation until cash was paid, because the Chancellor applied an irrebutable presumption that all the long negotiations had been merged in the two short notes of March 2, 1957.

The question is whether the conclusive presumption applied by the Chancellor denied Due Process, contrary to the doctrines of *Georgia R. & Elec. Co. v. Decatur*, 295 U.S. 165, 171 (1935) and the *Turnipseed* and *Tot* cases, 219 U.S. 35 (1910) and 319 U.S. 463 (1942); and whether Petitioners had an unfair trial because the decree in their favor in the trial court cut off objection on appeal to the arbitrary presumption, and the appellate court denied new trial with opportunity to offer this excluded evidence.

7. Arbitrary Finding of No Obligation of Respondent to Pay Interest and Attorney Fees Contracted for in Notes Made by Respondent and Held by Executor for Collection As Asset of Estate.

The decree of the State Supreme Court cancelled interest and attorney fee obligations of Respondent under clauses of promissory notes made by Respondent and held for collection by the Executor as assets of the Estate. The Chancellor found that no evidence was offered by Respondent to prove a claim of set-off pleaded by Respondent and

that the Executor, and not Petitioners as individuals, was the holder.[1] Not one scintilla of evidence is in the record showing any defense to the payment of said notes, with interest and attorney's fees, to the Executor. The State Supreme Court arbitrarily annuls an obligation of a contract. In this situation, the question is:

Whether the decree of the State Supreme Court is a violation of a property right in the notes, contrary to Due Process protection of property, or is a State judicial abrogation of the obligation of contracts, contrary to Article I, Section 10, Constitution, U.S., in the light of Section 34, Judiciary Act of 1789, 28 U.S.C. 725, in which "laws" meant court decisions having the effect of law, in the interpretation given in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, per Brandeis, J., and Edward S. Corwin, "Constitution of the United States of America, Analysis, and Interpretation", Senate Document No. 170, 1952, page 332.

8. ARBITRARY FINDING AGAINST PETITIONERS' GOOD REPUTATION.

Whether the State Supreme Court has so aggravated its arbitrary denial of a fair trial for the defense as to require a new trial because it declared the Petitioners "repudiated their agreement", a declaration contrary to undisputed documentary evidence (*i. e.*, reservation of the right to end negotiations and of continued efforts by Petitioners to have Respondent continue negotiations before they exercised the right to terminate, viz., letters of March 5, April 13, May 20, May 25, and May 31, 1957).[2]

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1. See p. A-23 below.

2. See p. 28 below.

Whether a Petitioner who is a member of the Bar of the State Supreme Court and of this Court may be declared to be one who has "repudiated" an agreement in a case in which he has not been permitted to try this issue of repudiation, a charge which is a reproach, as recognized by this Court in *Perry* v. *United States*, 294 U.S. 330, 351, (1935), and where professional repudiation thereby attacked is a valuable right and interest under the protection of the Due Process Clause, as recognized by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE; VERBATIM EXCERPTS.

I. In Matters Pertaining to the Action for Specific Performance, and Arbitrary Decree of State Supreme Court.

1. Mississippi Chancery Pleading, on Special Findings of Fact, on Issues of a Case; Section 1390, Mississippi Code of 1942:

> "Facts separately found.
>
> "The chancery courts in all litigated cases, upon request of any party to the suit, shall find the facts specially and state separately its conclusions of law thereon, and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Supreme Court."

2. Constitution of the State of Mississippi, 1890, Section 146:

> "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

3. Mississippi Code of 1942, Section 1639, Exceptions to Errors in Admission of Evidence Abolished:

> "And in such a trial [in all criminal cases and in all civil cases], provided objections are duly made and noted, no exception need be taken, either for the purpose of appeal or otherwise, or if taken shall not be noted, to any ruling or decision of the court, and this provision shall include the rulings of a court on objections to testimony."

4(a). Rule 11, Supreme Court, Mississippi; No Reversal for Harmless Error:

> "No judgment shall be reversed on the ground of * * * the improper admission or exclusion of evidence * * * unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

4(b). Rule 14(3), *ib.*, Only One Suggestion-of-Error:

> "After a suggestion-of-error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party."

Rule 33, *ib.*, Rules May Be Suspended:

> "These rules shall be considered as general rules for the government of the Court and the conducting of causes; and, as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice."

5. Due Process, Supremacy and Judicial Power Clauses of the Constitution of the United States of America:

> Amendment XIV, Section 1, Second Sentence, Clause 2; Article VI, Paragraph 2; Article III, Section 2.

II. Statutes Involved In the Matters Pertaining to the Executor's Right and Title in Notes of the Estate, and the Contract of Respondent as Maker, under State Law.

1. Mississippi Code of 1942, Section 517:

"Every executor * * * shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will * * *. He * * * shall collect all debts due the estate as speedily as may be, * * *."

2. Mississippi Code of 1942, Section 99:

"The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

3. The Constitution of the United States of America, Article I, Section 10:

"No state shall * * * pass any * * * Law impairing the obligation of Contracts."

STATEMENT OF PROCEDURE AND FACTS.

Summary of Ultimate Facts Here Pertinent.

The facts to be stated show how:

(1) The State Supreme Court, in reversing the decree for the Petitioners and refusing remand for trial of untried defenses, arbitrarily denied the Petitioners' right to a fair trial and opportunity to introduce evidence on their answer and defenses, pretermitted by the Chancellor, and denied their statutory and constitutional right to a finding thereon by the Chancellor as Trier of Facts; and how

(2) The State Supreme Court arbitrarily vetoed Petitioners' written conditions precedent to transaction of business with Respondent and to vesting any rights in him, thereby depriving Petitioners of liberty of contract and valuable property without Due Process of Law; and, hence

(3) The Petitioners properly may seek relief by certiorari and summary remand for trial of defenses pleaded as required by Due Process.

I. Outline of Defensive Issues and Procedure.

Since the relief sought is certiorari and summary remand for trial of defenses pleaded but not passed on by the Chancellor as Trier of Facts, in the light of *Saunders v. Shaw*, *supra*, *Kelley v. Everglades Drainage District*, *supra*, and other cases, the synopsis of the issues to follow is necessary to show denial of Due Process and a fair trial of these issues, and the right to relief by certiorari and summary remand, for trial of defenses, and not because the Court is asked to pass upon the merits of the case finally, unless the Court considers it is a precedent of general interest.

Summary of Procedure.

This case came to trial on bill for specific performance and answer denying a contract was created, alleging the Respondent inequitably misled the Petitioners, and requesting findings on seven issues of fact and conclusions of law therefrom. On objection by Respondent, the Chancellor erroneously excluded the Petitioners' documentary and testimonial defensive evidence, showing no contract was created by them in the series of letters relied on by Respondent. The Chancellor did not make the requested findings, and expressly said it was not necessary to decide as to the Respondent's inequitable conduct alleged by the

Petitioners (R. 404). He rested his decision for the Petitioners on the point that Respondent's alleged acceptance was not responsive to Petitioners' proposal to negotiate, was a counteroffer, therefore no contract was created (R. 403-404). Then the Chancellor dismissed Respondent's bill for specific performance, and gave judgment for the Executor on notes made by the Respondent in the action consolidated with the action for specific performance.

But the State Supreme Court reversed the Chancellor on his one ground of decision, found *de novo* and arbitrarily (1) that a contract had been created, (2) that the Respondent's conduct was equitable, ordered a decree for the Respondent, and overruled Petitioners' motion for remand of the case for trial on Petitioners' defensive issues set up in their answer and not reached or decided by the Chancellor.

Thus, the decree of the Supreme Court is not based on and is without any findings of fact by the Chancellor on the fact issues pleaded by the Petitioner and nullifies the written condition of negotiations; and on this basis the Petitioners will contend that the final decree of the State Supreme Court in this case is null and void, and that the Supreme Court of the United States has power and authority to grant certiorari and summarily to remand the case for trial on the defensive issues set up by the Petitioners in a trial *de novo*, within the doctrines of *Saunders* v. *Shaw*, 244 U.S. 317 (1917); and *Kelley* v. *Everglades Drainage District*, 319 U.S. 415 (1943).

First Ultimate Issue of Fact on Petition for Certiorari.

In the present petition for certiorari on the point of procedural Due Process, the first ultimate fact to be proved from detailed facts is that not only have Petitioners not had a fair trial, but they have not had a trial at all on the seven

defenses pleaded by them, because the evidence was excluded, and the required findings were not made (except on one point as to what is "cash", under defense No. 2). It follows from this that the State Supreme Court exceeded its judicial power in deciding the fact issues of the case *de novo*, and is void under the Due Process Clauses of State and Federal Constitutions because denying procedural Due Process which entitles Petitioners to a trial and findings on their answer and defenses, and because denying substantive Due Process by taking away liberty of contract and property without fair trial, arbitrarily nullifying written conditions precedent to opening negotiations and vesting rights in Respondent.

The burden of proof of showing a contract was created rested on the Respondent. Petitioners have not had a trial with opportunity to put in evidence on this issue, as required by Due Process.

The practical, present issue is:

Does Due Process require that this case be sent back for a t· .al of the Petitioners' answer, and its undecided issues denying the creation of a contract and alleging inequitable treatment of Petitioners by Respondent in falsely pretending to enter a family settlement transaction?

Present Case Not One of Construction of Established Contract.

This is not a case in which the issue is the construction of an established and admitted contract; but it is a case in which the central issue pleaded and contested is whether a contract was created, whether contractual intent was shown, and whether the Chancellor as the only proper trier *de novo* of issues of fact and law has tried the issue made and has made a record and a finding on this issue of contractual intent, on a record of competent testimonial

and written evidence free of harmful error. It is beyond dispute that the issue of contractual intent has not been tried in this case by the Chancellor; and it is clearly established by the statute and case law of Mississippi that the issue may not be tried in such a case as the present *de novo* in the State Supreme Court, where special findings have been requested in pursuance of the statute, Section 1390, and the record has been restricted by exclusion of defensive evidence in such a way as to deprive the defendant of opportunity of showing error in exclusion on issue of no-intent to create a contract, as distinguished from varying terms of an admitted contract (See pp. 40-41 below for citation of cases construing the statute).

Issues of Fact Pleaded, Forming Bases for Legal Conclusions to Be Urged.

1. Issues of Bill for Specific Performance.

Respondent filed a bill for specific performance in August, 1958, alleging and assuming the burden of proving that a letter by Petitioners of March 2, 1957, and a letter of March 6, 1957, by Respondent constituted a contract, that he had performed his duties and that the Petitioners had breached the alleged contract to sell land, and demanded $10,000.00 damages for breach of contract (R. 2-11).

2. Issues of the Answer Summarized (For Digest, see Appendix A below).

The Petitioners by sworn answer joined issue with Respondent's bill for specific performance as follows:

(1) By denial that their short note of March 2, 1957 (detached from a series of letters seeking to end Respondent's quarrels over paying his debts to the Estate, and his counter-charges against Petitioners), was intended or un-

derstood as an unconditional, final or complete offer to sell the land involved (R. 24, 26, 27, 28, 29, 31, 33);

(2) By pleading the purport and effect of the whole series of letters in which the Petitioners proposed an amicable settlement of Respondent's contentions[1] with his Parents' family, but in which the Respondent unconscionably deceived Petitioners,[2] did not consummate any agreement proposed by the Petitioners, and now seeks to take inequitable advantage[3] of them by deception in the present suit; and

(3) By summing up Petitioners' denials and defenses in seven issues on which the Chancellor as Trier of Facts was requested to make special findings, and, as Judge, separate conclusions of law therefrom (R. 41-42, 210). This request was made twice, once at the end of the answer (R. 41-42) and again at the end of the trial (R. 210). Such request is authorized and findings are required in such case under Section 1390, Mississippi Code, 1942, as construed in cases cited on page 40 hereof.

Under the cited statute, the Petitioners (Respondents in the Chancery Court) requested the Chancellor to "find the facts specially, and to state separately the conclusions of law therefrom upon the issues

(1) "that the Respondents made no complete and final offer to the Complainant prior to their draft of the

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1. Litigation over Respondent's notes held by the Estate, over identity of Rosalind Gwin Hutton, devisee of 1/3 of the land, and terms of proposed lease of land (R. 36).

2. Ostensibly recognizing Mrs. Johnson's title by stipulating in his deed that she was the intended devisee, then attacking her title on appeal, and losing the appeal. See p. A-14 below.

3. In present suit, claiming a binding agreement was reached. See p. A-16 below.

'Agreement and Warranty Deed Covering Land' of April 13, 1957;

(2) "that Complainant's letter of March 6, 1957, which is an exhibit to his bill is a counter-offer and is not an acceptance of terms proposed or offered by the Respondents;

(3) "that the Complainant made no valid acceptance of Respondent's proposal for an agreement and deed of April 13, 1957;

(4) "that it is inequitable for the Complainant to enter negotiations for an amicable settlement of litigated claims and for sale of land, and to attempt to hold the three Respondents as obligated to enter such contract and sale, and to execute a deed, and pay him damages, and at the same time to litigate title to one share of the land;

(5) "that Complainant has not paid the 1956 and 1957 rent balances on the said land, which payment was made a condition of completion, within a reasonable time, of the negotiations, and such continued delay and default is not equitable;

(6) "that the Complainant has not used due diligence in negotiating the proposed sale to completion as required by Respondent's offer to negotiate the sale on March 2, 1957;

(7) "and that the Respondents were entitled to close, and did close the negotiations on May 31, 1957, without any breach of any duty to the Complainant, and without liability in damages to him, because the Complainant himself dropped negotiations and resumed litigation, instead of completing the proposed Family Settlement."

II. Outline of Factual Background of Present Case.

1. Specific Pertinence of the Facts: Substantial Federal Rights Involved but Trial and Findings Thereon Denied.

To grant the relief requested of remand for a trial of Petitioners' issues for the defense, it is not necessary that the Court weigh finally the facts in issues on the merits. The Court need only look far enough to see (1) that on these pleaded issues the Petitioners were entitled to a trial and findings by the Chancellor, but the essentials of a fair hearing and trial and findings by the Trier of Facts were denied by the final order of the State Supreme Court; and the Court need only look far enough to see (2) that even on this restricted record the State Supreme Court has arbitrarily denied substantive Due Process in nullifying and vetoing the Petitioners' written conditions precedent to opening any business transaction with the Respondent until he retracted public, unprintable insults, and in nullifying conditions precedent, *i. e.*, cash payment and other specified acts, to vesting any property rights in him derived from them.

The Petitioners' liberty of contracting with Respondent only on condition of respect for human personality is vital to the peace and harmony of their families, and so is a vital right; the Petitioners' valuable property also is a necessary means of support; and both involve substantial Federal rights and so are protected by Due Process.

2. Evidentiary and Procedural Presumption.

The Petitioners ask recognition of the procedural presumption on the factual background of the truth of Petitioners' pleadings and evidence, for purposes of deciding their right to a trial and to findings on the issues as a matter of Due Process of Law.

The statement of the facts of this case includes as facts where expressly indicated the statements made in Petitioners' pleadings, because the Chancellor as Trier of Facts omitted decision of the Petitioners' defenses, and expressly stated that decision of Respondent's inequitable conduct to Petitioners as alleged by Petitioners was not necessary to a decision for them, and, since the decision of these issues by the State Supreme Court *de novo* is unauthorized,[1] leaves the defensive issues untried. It is believed that the facts as pleaded by Petitioners are to be taken as true for purposes of review of the Due Process right to a trial;[2] and, similarly, the evidence offered by the Petitioners on these issues is presumed to be true.[3]

With benefit of this principle of the procedural presumption, and for the purpose only of determining Petitioners' procedural and substantive Due Process right to a remand for trial of their said defensive issues on this record, the facts are outlined and summed up, with references to support the characterization given.

1. Sec. 1390, Miss. Code 1942. *Southern Package Co. v. Bevill, Saunders v. Shaw*, and cases p. 40 below.

2. *Kennedy v. Porter*, 170 So. 226, 176 Miss. 742 (1936) (Answer stricken on motion is presumed true on appeal.)

3. *Skrmetta v. Moore*, 36 So.2d 53, 202 Miss. 585 (1947). *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The case stands as if a demurrer had been offered both to the pleaded defenses and to the offered evidence, and as if a ruling had been made denying the Petitioners a right to findings on defenses pleaded, and also the right to make reasonable conditions for opening negotiations with Respondent and for consummating a land sale to him. In such case the pleader is entitled to have the truth of his pleadings when taken to be true constitute a legal defense

3. Transaction in Issue: Petitioners' Proposed Settlement of Respondent's Economic Problem and of His Contentions with His Parents' Family, the Petitioners; and Respondent's Abandonment of Negotiations.

For the purposes of this petition for Due Process by certiorari, the gist of this case pleaded and offered to be proved, but evidence of which was largely excluded, is the Petitioners' Constitutional right to propose, and to be bound only by their proposed, conditions and terms for settling Respondent's difficulties and litigations with them and for negotiating a cash-on-the-barrel-head sale of land with the Respondent (R. 469-470, 478, 480-481, 485), under the circumstances now to be summarized.

Here the ultimate fact which Petitioners would show is that they had every reason to propose an end to Respondent's claims and lawsuits against the.. proposed a settlement, Respondent apparently agreed to enter negotiations and to end the litigation but deceived Petitioners and seeks to take unfair advantage in the present suit. The supporting facts are summarized in the following paragraphs.

On June 25, 1955, the Respondent secured a written lease for 1956 and 1957 to the 200-odd acres of cultivated land near Tchula, Mississippi, here involved, from Mrs. R. G. Hutton, his Mother (R. 372-373); paid a part of the rental in cash and for the balance made two notes together for $3,200.00 payable to Mrs. Rosalind Gwin Hutton, due respectively November 1, 1956, and November 1, 1957 (R. 409, decree; 405, Court finding; 370-371; R. 165 Pleading of Petitioners). On July 19, 1955, Mrs. R. G. Hutton revised her Will by charging Respondent with capital advanced to him, not devising any farmland to Respondent, and devising the farmland to the three Petitioners, one a resident of Maryland, one of North Carolina, and one of Jackson.

Mississippi (R. 214-215, 217, 19-21). The said Mrs. R. G. Hutton died on November 23, 1955. The Respondent attacked the Will,[1] filed claims against the Estate, dropped same (R. 167, declaration of Executor), denied liability on the said rent notes, dropped the Will contest, claimed his Daughter, Rosalind Gwin Hutton, III, was devisee of 1/3 the land under a devise to "Rosalind Gwin Hutton", alleging she was the only person of that name, demanded construction of the Will, and also complained that he could not support his family unless he could lease the land for 1958 (R. 34-37. Purport of letters and exhibits, answer of Petitioners). The Executor had filed a petition January 5, 1957, to construe the Will at Respondent's demand (R. 21, Answer of Petitioners); but on January 29, 1957, in response to Respondent's cry of hardship, the Petitioners offered to settle all Respondent's outstanding contests and to lease the land to him for 1958 at the same rental Respondent had agreed on with his Mother, Mrs. R. G. Hutton, in June 1955 (R. 37, 388-389, letter admitted for identification). Respondent declined, but offered to buy 1/3 of the land on behalf of his Daughter from Mrs. Johnson, one of the Petitioners (R. 37, Answer). Petitioners did not accept this offer, which was made on February 4, 1957. On March 1, 1957, the court in charge of the Estate construed the Will and held that Respondent's Daughter, Rosalind Gwin Hutton, III, had no title to 1/3rd of the said land, but that the devise of it was to the Testatrix' Daughter and namesake, one of the Petitioners, Mrs. Rosalind Gwin Hutton Johnson (R. 3, Respondent's Bill).

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1. Alleging mental incapacity of Testatrix July 19, 1955, at a time when he had admitted her capacity to indorse notes made by him payable to her in consideration of written lease taken from her, June 25, 1955, as appears from this record, under Sec. 99, Miss. Code, 1942, on admission by maker of note of capacity of payee to indorse (R. 35, 214-215, 372-373)

At the court house, when this decision was made, the Respondent became angry, and cursed and grossly insulted one of the Petitioners, Mrs. McCutchan, and also a Brother, who is not a party to this case (R. 262-263, 326, 37 Answer of Petitioners). Then the next morning, March 2, 1957, by telephone, the Respondent asked the Petitioners to sell to him in his own right the entire three tracts of land (R. 327, 336; 37, Answer of Petitioners).

On March 2, 1957, the Petitioners replied by two notes, not mailed, but handed in person to Respondent (R. 325-326, 377-378); and made two conditions: (1) Before the Petitioners would transact any business with Respondent, it would be necessary that he make written retraction of and expression of regret for his said gross, personal insults of the previous day, and (2) that the proposed sale would be for cash.[1] By letter of March 5, 1957 (actually received March 10, 1957, Respondent testified), Petitioners informed Respondent further that the offer to sell for cash was a simple offer based on no consideration and that no obligation was assumed, unless and until the proposed price was paid cash-on-the-barrel-head in exchange for a deed.[2]

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1. March 2, 1957: "Before we transact business with you it will be necessary for you to give written expression of regret for and retraction of the statements you made to Mary Ryburn and Charlton on March 1, 1957." (R. 241-242).

March 2, 1957: "We will sell our rights by warranty deed * * * for $30,000 cash, etc. etc." The full text of these letters is given on pages 241-242, 239, 240, of The Record.

2. March 5, 1957: "It is not our intention to be obligated legally to you in any respect unless and until you

On March 8, 1957, Respondent mailed a definite apology (R. 262, 263) to one of the Petitioners (an indefinite apology of March 4th having been rejected March 6th) (R. 235, 256, 260, 261), and the Petitioner to whom the apology of March 8th was mailed wrote to the Respondent on March 9th (R. 268, 269) that she was mailing the apology to another Petitioner in Maryland and that a written reply would be made to Respondent after the apology was received in Maryland by the other Petitioner. On March 20th, 1957, Petitioners wrote to Respondent that they had begun drafting a deed, thereby indicating that the apology was accepted and negotiations had begun of the proposed land sale (R. 296, 297, 382). On April 13, 1957, the Petitioners

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pay over $30,000, in exchange for a deed to the land; and it is not our intention of giving you any ground or pretext of getting into court if we decide to revoke this offer prior to your payment of the $30,000. It is an open and simple offer, based on no consideration which we accept or desire to accept, as constituting any contract whatsoever; it is intended merely to give you a reasonable opportunity to see whether you want to raise and can raise $30,000 and care to lay it on the table in exchange for a deed. It is not our intention that our legal relationships shall be changed, or that we shall assume any obligation whatsoever to you, unless and until you accept in the prescribed manner of laying down the cash in exchange for the deed. There are several other matters to be cleared before we will even enter into a cash-on-the-barrel-head transaction with you." The text of this letter, in full, is given on pages 270-271 of the record.

For detail of dates of receipt and facts showing this March 5th letter was in Respondent's hands before negotiations were open for land sale, see R. 456.

sent to Respondent a draft of a deed and agreement (R. 272, 273, 275, 276). This draft stipulated that the devisee "Rosalind Gwin Hutton" of 1/3 of the land was Mrs. Rosalind Gwin Hutton Johnson, who was the person whose title was recognized by the decree of the preceding March 1 in the title contest which Petitioners desired to settle (R. 275, 276).

Now, on March 4, 1957, before apology was made and the sale negotiation was open, Respondent had left a draft of a deed with the Petitioners' attorney (R. 250-251), and the Respondent's own draft of a deed stipulated that the devisee, "Rosalind Gwin Hutton", of 1/3 of the land was Mrs. Rosalind Gwin Hutton Johnson, as decreed by the court on the previous March 1 (R. 250-251). Thus, both these drafts of deeds which are in evidence support Petitioners' pleaded defense that a settlement of this litigation was the basis of the proposed agreement, and that Respondent's later attack by appeal on Mrs. Johnson's title abandoned the entire negotiation.

Also, on March 6, 1957, again before the required apology was made and before negotiations of the sale were open, Respondent wrote a letter now alleged to be a binding acceptance of an allegedly unconditional offer made by Petitioners to sell the land (given in full on pp. 243, 244, record). But no agreement by Respondent was made to the Petitioners' draft of a deed of April 13, 1957, and no agreement by Petitioners was made to Respondent's draft of a deed of March 4, 1957. Then, on April 25 or 26, 1957, the Respondent reopened his attack on Mrs. Johnson's title, thereby abandoning the proposed family settlement (R. 339). By a series of letters dated April 13, May 20, May 25, and May 31, the Petitioners asked the Respondent to continue the negotiations, received no reply, and so closed the negotiations on May 31, 1957 (R. 272-273, 300-301;

298-299, 303-304). In June, 1958, the Respondent lost his appeal in his Daughter's name attacking Mrs. Johnson's title and then began the present litigation to force a conveyance from the Petitioners on the contention a contract was created by the letter of March 2, 1957, stating the proposed price, and the March 6th, 1957, letter of Respondent purporting to accept, but (Petitioners say) with three material qualifications; and also the Respondent demanded $10,000.00 damages for delay in deeding the land to him (R. 315-316; 22, Answer of Petitioners). His bill was dismissed by the Chancellor in the early part of 1959, but has been indorsed by the State Supreme Court in April, 1960, without a trial record containing the competent offered evidence and without a trial finding on the defenses requested by Petitioners under the State statute requiring such findings.

III. Trial and Appellate Procedure.

1. Chancellor's Rulings Excluding Petitioners' Proof, but Giving Decree for Petitioners on One Point.

At first the Chancellor erroneously applied the parol evidence rule to and excluded the whole series of letters and testimonial evidence[1] offered by the Petitioners to show no contract was created by the letters, and also excluded evidence of Respondent's inequitable conduct toward Petitioners in the case; but, nevertheless, later, the Chancellor gave decision for the Petitioners on the one ground that the Respondent's attemptive acceptance was invalid because he said in it he would deliver cashier's checks and not cash, as Petitioners had said would be necessary before legal relationships would be changed.

Consequently, the Chancellor omitted making the required findings of fact on the defensive issues pleaded by

1 See p. A-6 below.

Petitioners, and conclusions of law therefrom (except as to the cash requirement); and the Chancellor said a finding by him, as Trier of Facts, was not necessary as to Respondent's inequitable conduct alleged by Petitioners in their answer, as a bar to his claimed remedy of specific performance (p. A-17 below; R. 404).

2. Appellate Decision, Usurping Functions of Trier of Facts De Novo, and Arbitrarily Denying Petitioners' Liberty of Contract and Property Without Due Process of Law.

Then the State Supreme Court (1) reversed the Chancellor as to the ineffectiveness of Respondent's proposal of delivering cashier's checks, in lieu of cash, holding that if cash was meant Respondent could conform at the exchange (p. B-23 below, R. 438), (2) made a *de novo* finding on an imperfect record that the Petitioners had made an unconditional promise to sell land, to become binding on a promise by the Respondent to pay, which also the Court found, and thereby arbitrarily denied both procedural and substantive Due Process to Petitioners,[1] inasmuch as (a) the issue had not been tried and made subject to a finding by the trial court that a contract had been created, (b) the Petitioners' evidence, both documentary and testimonial, had been excluded, and (c) what evidence was in the record showed conclusively that the Petitioners had imposed conditions precedent to opening negotiations and vesting any rights in Respondent and that these conditions were not complied with so as to create a contract with Respondent.

The State Supreme Court made a finding of fact that Respondent's conduct toward Petitioners was equitable,[2] but the Chancellor had pretermitted this issue, expressly, and also had excluded Petitioners' evidence on it.[3]

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1 See pp. A-9, A-14 below.

2 See p. A-17.

3 See pp. A-16-17.

The State Supreme Court also without evidence to support it found the Petitioners had repudiated their agreement.

3. Action and Decision on Notes Made by Respondent and Held As Asset of Estate.

The Executor of the Estate of Mrs. R. G. Hutton is the holder of and is under duty to collect two notes payable to Mrs. R. G. Hutton made by the Respondent, June 25, 1955, due, respectively November 1, 1956, and 1957, each for $1,600.00, with interest after maturity and 10 percent attorney fees, if sued on. The Executor sued the Respondent on the notes in September, 1958. The Respondent claimed the Estate was indebted to him, but at trial the Chancellor found that Respondent offered no proof of the alleged set off. The Supreme Court reversed the Chancellor as to the interest and attorney fees, but the opinion is unclear as to the principal of the notes, although the word "rent" as used in the decision may be contended to apply to the rent note principal. The action was consolidated with the action for specific performance. See pages A-22-23 below, and R. 164-177, 405, 409, 439.

This is the basis of the Executor's position that the decision of the State Supreme Court is without a scintilla of evidence, and deprives the Executor of the Estate of property without Due Process and abrogates the obligation of contracts.

STAGE OF PROCEEDINGS AT WHICH AND MANNER OF RAISING THE FEDERAL QUESTION OF PETITIONERS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

On April 4, 1960, the State Supreme Court reversed the decree for Petitioners and gave its order to enter a decree for the Respondent. Then the Petitioners at once, on April 15, 1960, filed a Suggestion-of-Error that Petitioners had been denied Due Process of Law under the Federal Constitution in being deprived of liberty of contract and property by arbitrary disregard of written, undisputed conditions precedent to vesting contract rights in Respondent and denial of property or contract rights in negotiable instruments (R. 469, 478, 481, 484, 485); and also made Implementing Motions to cure want of Due Process by giving a rehearing or remand for a new trial on the defenses and issues of their answer (R. 485).

In the Implementing Motions, Petitioners asked that the case be remanded for a plenary trial and hearing *de novo* in order that the issues of the case as made by the Petitioners' answer and exhibits might be developed and the complete series of letters introduced since the record showed that the Chancellor exercised his discretion to exclude evidence in support of the pleadings of Petitioners and the exhibits to their answer, and since the entire transaction is competent and will demonstrate that the parties to the case never came to an agreement or a meeting of the minds and intentions on any agreement, and Respondent's action should be dismissed (R. 485).

The Chancellor had expressly ruled in his decision that it was not necessary to decide the inequitable conduct of Respondent "as alleged by defendants", thereby expressly pretermitting these issues, and rendering it neces-

sary on reversal that the case be re-tried. See page A-17 below. Also, Petitioners' Suggestion-of-Error in asking for remand for trial of said defenses expressly directed attention to the exercise of the Chancellor's discretion to exclude their evidence (R. 485), the evidence being both testimonial evidence and documentary evidence (pages A-3—A-7, A-16-17, below).

The said Court has had full and fair notice of its *great errors of negligence* in this case, as the following procedure will show.

The Petitioners were taken by surprise at the decision of the State Supreme Court of April 4 deciding pretermitted issues not found by the Chancellor as Trier of Fact, and were more surprised at the order of the State Supreme Court of May 2, 1960, refusing to grant Petitioners' motion to remand the case for a trial on the defensive issues of their answer. In this state of the record, the Petitioners had no further standing *as of right* to move for reargument, but gave notice to the Court (by Notice and Motions of May 30, 1960, filed June 3, 1960 (R. 488-490), in the same term and before mandate to the Chancery Court of Holmes County issued) of the Court's inherent power on its own motion to recognize the Petitioners' right to trial of the defensive issues, and specifically cited *Southern Package Co.* v. *Beall* and *Saunders* v. *Shaw* as approving Petitioners' Due Process right to such trial, gave notice of Petitioners' intention of filing petition for certiorari in this Court on or before August 1, 1960, and asked for stay of mandate pending proceedings on said petition for certiorari.

The State Supreme Court did not issue its order remanding said cause for entry of a decree of specific performance and the cause remained in the said Supreme

Court and subject to its jurisdiction. In order to exhaust all State remedies Petitioners by motions filed June 28, 1960, invoked Rule 33 of the State Supreme Court[1] (which reserves to the Court the right to suspend the strict rule permitting only one suggestion of error, along with other rules of the court, where deemed necessary to avoid surprise or miscarriage of justice), and asked leave to file at the July, 1960, motion day a motion for reargument of the motion implementing their Suggestion-of-Error, for remand of the pretermitted defensive issues, citing *Southern Package Co.* v. *Beall, Saunders* v. *Shaw*, and *Kelley* v. *Everglades Drainage District*, *supra*, as showing the Petitioners have a Federal right to a trial of said defenses as a matter of Due Process (R. 493). But on July 11, 1960, without opinion, the State Supreme Court overruled the said motions of June 28, 1960, and denied the Petitioners right to a trial of the said defensive issues pretermitted by the Chancellor, and to a fair trial on the issues of the said Petitioners' answer with opportunity to introduce evidence, asserted in their Suggestion-of-Error, and reasserted with citations to the aforesaid cases in the said motions of June 3 and June 28, 1960.

(See, on authority to raise Federal questions in Suggestion-of-Error in order to reach denial for the first time of basic rights in an appellate court and bring a case to the Supreme Court of the United States, the opinion of Mr. Justice Holmes in *Saunders* v. *Shaw*, *supra*, quoted on pages 43 and 44, below, and *Grannis* v. *Ordean*, 234 U.S. 385, 392 (1914).)

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1. Set out on page 14 above.

ARGUMENT OF REASONS FOR ALLOWING CERTIORARI AND FOR SUMMARY REMAND TO TRY THE UNTRIED DEFENSIVE ISSUES PLEADED AND TO MAKE REQUIRED FINDINGS OF FACT THEREON, OR FOR DETAILED REVIEW AS A USEFUL PRECEDENT ON INVALIDITY OF A DECREE MADE WITHOUT FINDINGS OF FACT REQUIRED BY STATUTE AND DUE PROCESS OF LAW.

Situation.

The present case was tried before a Mississippi Chancellor who acts both as judge and also as a one-man jury and who is required to make special findings of fact and separate conclusions of law therefrom on requested issues in pleadings. See Section 1390, Miss. Code, 1942; and cases p. 40 below.

The present record shows that the Chancellor trying the case made no findings on the Petitioners' defenses, duly pleaded (except one point on which he rested decision for the Petitioners), that while the State Supreme Court has only appellate power and has no power to make findings of fact *de novo*, nevertheless, the State Supreme Court has itself made findings of fact *de novo* in this case on a restricted and erroneous record and has given a judgment for Respondent without the required fact finding foundation afforded by a record of the trial of the issue and the findings *de novo* of the Chancellor, and in truth without supporting evidence even on the limited record before it.

Petitioners submit that Due Process of Law prohibits the taking away of liberty of contract and property from

1 Pages 30-31 above; 41, 44 below.

the Petitioners by this State judgment rendered without findings of fact by the Chancellor on legal defenses to the suit, just as Due Process would forbid execution of an accused man on a judgment without a verdict finding the facts of the case.

In this situation, the Supreme Court of the United States has power and authority to review and correct this anomalous State judgment for the following reasons:

I. Reasons for Certiorari and Summary Remand for Trial of Pretermitted Defensive Issues of Fact.

Since the record shows that the State judgment flagrantly denies the Constitutional right of Petitioners to a trial and findings on the fact issues of the case; the present case may be remanded summarily for trial *de novo* of the Petitioners' defenses, upon proof[1] that said issues have been made but have not been tried or found by the Chancellor. The request for summary remand is supported by decisions in *Saunders* v. *Shaw* and *Kelley* v. *Everglades Drainage District* in the Supreme Court of the United States and by *Southern Package Co.* v. *Beall*, and other cases in accord, in the Supreme Court of the State of Mississippi, to be cited herein (See pages 38-41 below).

II. Reasons for Grant of Certiorari Exercising the Judicial Power of the Supreme Court of the United States.

This case may be reviewed under the principles of Due Process as a useful precedent of general interest to prevent increase of the case-load of this Court and of other Courts from similar judicial errors in future in-

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[1] See Appendix A giving the proof, at pages A-6, A-11, A-12, A-17, A-19, A-20, A-22.

volving appellate review of special findings by triers of facts.

Summary.

Petitioners submit that:

1. No citizen of the United States of America without Due Process of Law can be deprived by a State of his rights to life, liberty and property so long as the Supreme Court of the United States has and exercises judicial power to protect such Constitutional rights.

2. But the Petitioners, without a trial and findings by the Chancellor on their defenses, and hence without Due Process of Law, have been deprived of their rights to liberty of contract and to property by a final judgment of the State Supreme Court.

3. Because of this deprivation of Petitioners' constitutional rights, the Supreme Court of the United States ought to reverse the State judgment and, summarily or after argument, ought to issue its order that the Petitioners be given a trial of their defensive issues before their liberty of contract is impaired or their property is taken away from them.

The foregoing summary of argument is supported by the following detailed argument.

Judicial Power of Supreme Court of the United States.

The Supreme Court of the United States of America has jurisdiction in cases arising under the Constitution of the United States and has exercised it to protect individual liberty and valuable property rights against violation contrary to Due Process of Law. *Sam Thompson v. City of Louisville*, (1960) No. 59, 4 L. Ed.2d 654; *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *United Gas Pub. Ser. Co. v. Texas*, 303 U.S. 123, 143 (1938).

Fundamental rights of necessity imply a remedy; *ubi jus, ibi remedium*, where there is a right, there a remedy exists also; and the Supreme Court of the United States is the protector of fundamental rights of citizens of the United States. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 39-40 (1916), citing 1 Co. Dig., Action upon Statute (1915).

Procedural Due Process.

The present case presents denial of the fundamental right to a hearing of defenses with an opportunity to introduce evidence and to have a decision by the Trier of Fact, the Chancellor. This right is procedural Due Process. It is recognized in *Saunders* v. *Shaw*, 244 U.S. 317, per Holmes, J.

Saunders v. *Shaw*.

In *Saunders* v. *Shaw* and *Board of Drainage Commissioners*, 244 U.S. 317, per Holmes, J. (1917), an action for an injunction was brought by a taxpayer against collection of a drainage tax, and he offered to show his land was an island outside the drainage district and received no benefit. Defendant's objection to the evidence as inadmissible on the pleadings was sustained. The defendant offered evidence to show the land was not an island, in the Gulf of Mexico, but the plaintiff was not permitted to cross-question the witness, because the question was not open. Judgment for the defendant was affirmed at first on appeal, but on rehearing was reversed, and it was held that the land was low, marshy, and was not benefited; and the injunction was granted. An intervening defendant, a bondholder, applied for a second rehearing, but was denied under a rule permitting only one rehearing; and this defendant appealed to the United States Supreme Court as plaintiff in error.

It was held: "He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible in accordance with his view." "Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of the *Myles Salt Co Case*, that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." Hence, the decision was reversed.

Kelley v. *Everglades Drainage District*.

Likewise, in *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, per Curiam (1943), it was held that certiorari should be granted, a judgment vacated, and the case should be summarily remanded for findings of fact required by statute as basis of a judgment in approving a plan for composition of debts (under Sec. 83(e) of the Bankruptcy Act, and Rule 52(a), Rules of Civil Procedure, and General Order in Bankruptcy, No. 37, requiring the court to find the facts specially) because the record lacked the findings of fact required by the statute and the General Orders in Bankruptcy. "We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." "To support such determinations,

there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated." *Ib.*, p. 420.

In accord: *Consolidated Rock Prod. Co.* v. *DuBois*, 312 U.S. 510, 520-525 (1941); *Wilson Cypress Co.* v. *Del Pozo*, 236 U.S. 635, 657 (1915). Cf. *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 274 (1949) findings of fact shall not be set aside unless clearly erroneous.

Mississippi Chancery and Appellate Jurisdiction.

The fundamental right to a trial and findings on defenses in Chancery is recognized in Mississippi. It is held that the defenses made in equity, on which request for special findings of fact and conclusions of law is made, must be tried by the Chancellor under Section 1390, Mississippi Code, 1942, and that the Mississippi Supreme Court has no power to try such issues when pretermitted by the Chancellor. This is the express decision of the present Chief Justice of the Supreme Court of Mississippi in the case of *Southern Package Co.* v. *Beall*, 180 So. 789, 181 Miss. 740 (1938). Petitioners had and have no opportunity to argue the denial of their motion for new trial, which motion lies as a matter of course, and as to which the Petitioners are taken by surprise, by the summary order of May 2, 1960. Other Mississippi cases in accord with the *Southern Package Co.* case, *supra*, are: *Bullard* v. *Citizens National Bank*, 160 So. 280, S. Ct. Miss. (1935); *Pittman* v. *Martin*, 43 So. 668, S. Ct. Miss. (1949); and *Owen* v. *Owen*, 88 So.2d 100, S. Ct. Miss. (1956). These cases were decided under the statute (Section 1390) requiring special findings and mark the significant and important departure from proceedings which are not governed by this statute but on which a general decree is not

based on special findings but is rendered without special findings and on the record as a whole, and so are less susceptible of review. Cf. *Yazoo etc. R. v. Adams*, 32 So. 937, 942-944, 81 Miss. 90 (1902).

It was held in *State Highway Commission* v. *Coahoma County*, 32 So.2d 555, 565 (1947), S. Ct. Miss., per Griffith, J., "The Supreme Court has appellate jurisdiction only, and is not authorized to piece out a decree by making findings of facts." In accord: Cf. *White* v. *State*, 131 So. 96, 159 Miss. 207 (1930); and concurring opinion in *In re Steen*, 134 So. 67, 72 (1931), on lack of power of Mississippi Supreme Court to try issues or cases *de novo*, and restricting its power to that of review of records of trial courts, with certain unusual exceptions, of which the present case is not one.

Denial of Procedural Due Process in Present Case.

On the pleadings and evidence offered by the Petitioners the issue is made that the status of the letter of March 2, 1957, as to terms of the proposed sale, is not that of a contract document, and that the series of letters written by Petitioners from March 2 through March 5 is not a contract document, because no contractual intent existed or was shown; and no final or definitive offer was made until Petitioners submitted their draft of an "Agreement and Warranty Deed Covering Land" on April 13, 1957; but the Respondent rejected this, the only complete and final offer the Petitioners ever made. This is Petitioners' defense summarized as No. 1, page 19 hereof.

The Chancellor as the Trier of Fact has not made a record on but has excluded the evidence and has not decided this issue of fact; the State Supreme Court has no power under the State Constitution to try this issue *de*

novo, especially on a record from which Petitioners' evidence in support of the issue had been excluded by the Chancellor, in his discretion, as shown in his opinion, and also at trial, to avoid "encumbering" the record,[1] and also on the mistaken idea the parol evidence rule applied.[1] The issue was contractual intent to create and establish a contract, not interpretation of an established contract to which the parol evidence rule applies. For the State Supreme Court thus to deny Petitioners' right to remand for a trial of this issue by the Chancellor and for the State Supreme Court to try it *de novo* is a denial of procedural Due Process, especially on an erroneous and limited record *Georgia R. J. Elec. Co.* v. *Decatur*, 295 U.S. 165, 171 (1935).

Constitutional Question Raised Promptly by Petitioners.

At once, when their basic rights to Due Process were denied thus by the shift of ground of decision made by the State Supreme Court and by denial of new trial on the defenses of the answer, the Petitioners filed a Suggestion-of-Error invoking substantive Due Process under the Federal Constitution against denial of liberty of contract and property, arbitrarily and without justifying evidence. At the same time, by Implementing Motions to cure denial of Due Process, Petitioners moved the Court to grant a new trial on the defensive issues, which the Chancellor had pretermitted, thereby asking for a trial thereon with opportunity to introduce evidence, to which they were entitled under procedural Due Process. This motion was denied without opinion. On denial of this motion implementing substantive Due Process, at the same term and before mandate issued, the Petitioners gave notice of denial of said Due Process rights, citing *Southern Package Co.* v. *Beall* and *Saunders* v. *Shaw*, and moved the

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1. R. 324. See pp. A-6-7 below.

Court to stay its mandate pending appeal to this Court by petition for certiorari to request remand for trial of the defenses of the answer, notifying the Court, further, that the case was one in which only on its own motion might relief be given in said Court, under Rule 14(3) of the Court, cutting off the right to argue after suggestion-of-error. On June 28, 1960, Petitioners moved for reargument, as stated on page 34 above citing *Saunders* v. *Shaw*, etc.

The test of the sufficiency by suggestion-of-error, implementing motions, and notice of denial of Due Process thus given by Petitioners, in the particulars specified, is given in an opinion by Mr. Justice Story, in *Crowell* v. *Randell*, 35 U.S. 367, 397 (1836), that it is sufficient if it is clear that the question was made and that the court below must have decided the question in order to come to a decision, but it is not indispensable that the question was made and a decision given by the court below on the very point, in *totidem verbis*, by direct and positive statement. See also *Grannis* v. *Ordean*, 234 U.S. 385, 392 (1914).

The foregoing is believed to be all that Petitioners reasonably may be required to do in giving notice to the appellate court which has taken Petitioners by surprise at the last phase in denying a motion which lies of course for new trial on untried defensive issues. In similar case, *Saunders* v. *Shaw*, *supra*, held: "The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap

in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. * * * It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the State by his assignment of errors. We do not see what more he could have done."

Summary Remand.

For denial of the elementary Due Process right to a trial of defensive issues not tried, found or disposed of, a new trial *de novo* should be given Petitioners, under the principles of *Saunders* v. *Shaw*, *Kelley* v. *Everglades Drainage District*, decided in this Court, and of *Southern Package Co.* v. *Beall*, and other cases decided in the Mississippi Court. Cases approving certiorari and summary remand are: *Kelley* v. *Everglades Drainage District*, *supra*; *Ewing* v. *Gardner*, 341 U.S. 321 (1951), *McDaniel* v. *The Lisholt*, 359 U.S. 26 (1959); *Securities & Exchange Com'n* v. *Otis & Co.*, 338 U.S. 843 (1949).

Denial of Substantive Due Process.

The present case presents a denial of fundamental rights of liberty and property in consequence of arbitrary findings unsupported by evidence, that the Petitioners made an unconditional offer to sell the land. Petitioners made express written conditions (p. 26, above), which the State Supreme Court has nullified (R. 432, p. A-14 below). Thus Petitioners have been stripped of liberty to make contracts only on conditions voluntarily agreed to by

them, there being no question involved of any State statute regulating the power of contracting and bargaining, as in the classic cases defining the orbit of the right of the individual to contract. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897); *Coppage* v. *Kansas*, 236 U.S. 1, 14 (1915); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Adair* v. *United States*, 208 U.S. 161, 172, 173 (1908) quoting *Cooley* on "Torts", page 278, on liberty of declining to contract; *Texas N.O.R. Co.* v. *Railway Clerks*, 281 U.S. 548, 570 (1930); *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 33 (1936); *Phelps Dodge* v. *Labor Board*, 313 U.S. 177, 187 (1941); *III Pound*, "Jurisprudence", 156, note 4, 159.

Hardship of Respondent's Actions.

Petitioners are made liable for heavy damages for a long delay caused solely by Respondent in delaying assertion of any claim while he reopened litigation, and then reasserting his claim after losing the suit in which he attacked title of one of the Petitioners although Petitioners really have no contract with the Respondent. The record shows that the Respondent has been in possession of this land for 1956 and 1957 without paying the rent balance notes due thereon. He was in possession in 1958 and paid no rent. He has burdened the Petitioners with litigation for over five years, and has not sustained a single claim until the present decision of April 4 and May 2, 1960, which is a miscarriage, contrary to elementai Due Process, but subject to correction in this Court.

Repudiation Found Arbitrarily.

The case also involves an arbitrary finding of repudiation by Petitioners of an agreement, attacking the reputation of the Petitioners, one of whom is an attorney, and all of whom are entitled to fair treatment after their day

in court on their pleaded defenses. Cf. *Perry* v. *United States*, 294 U.S. 330, 351 (1935), on reproach of "repudiation"; and *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (1957), on value of professional reputation, as an interest and right within the protection of the Due Process Clause.

Nullification of Note Provisions Is Judicial Abrogation of Obligation of Contracts, Against Due Process on Property, or Against Article I, Section 10, Constitution, on Contracts.

The nullification of the interest and the attorney fee clauses of the said notes denies property without Due Process, and abrogates the obligation of contracts. Cf. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and Edwin S. Corwin, "Constitution," annotated, p. 332 (1952), Art. I, Sec. 10, Constitution, and analysis in discussion R. 481 Suggestion-of-Error.

General Importance of the Present Case As a Precedent.

A Chancellor may omit making a required finding on a good defense pleaded provided he gives a decision on another ground for the pleader. An appellate court that reverses the Chancellor on his ground of decision is required by Due Process to give the pleader the benefit of his good defense pleaded, by remanding the case for trial thereon. *Saunders* v. *Shaw* held that a shift by an appellate court of the ground of excluding evidence and a decision of the issue concerned denies Due Process. *Kelley* v. *Everglades Drainage District* holds invalid a decree not based on required findings. The present case involves the principles of these two cases in a matter involving pleading operative facts and requesting special findings thereon in chancery, discretionary exclusion of defensive issues, exclusion of defensive evidence and a decree for the defendants Petitioners here. This was followed by

shift of ground of decision in an appellate court, and d
nial of a trial on the defensive issues. Clarification of t
requirements of Due Process might be promoted by a d
tailed examination of this case (Cf. *Dalehite* v. *Unit*
States, 346 U.S. 15, 24, Note 8) though decision may
rested summarily on *Saunders* v. *Shaw* and *Kelley* v. *Eve*
ridge Drainage District.

RESUME.

The present case was reviewed by the State Supren
Court on a record restricted in two ways: (1) Petitioner
testimonial and documentary evidence had been exclude
but the decree in favor of the Petitioners made the erro
harmless and cut off any right to object to error in excl
sion of evidence of no contractual intent in the detache
letter of March 2 relied on by Respondent, and of Respon
ent's inequitable deception of Petitioners in ostensibl
agreeing to stop a lawsuit attacking the land title; and (2
requested findings of fact on Petitioners' defenses wer
omitted by the Chancellor although the statute require
finding.

Then on this restricted record the State Supren
Court reversed the Chancellor made findings of fact n
more adverse to the Petitioners on the pleaded fact issue
directed a decree for the Respondent and denied Petitioner
Suggestion-of-Error and Implementing Motions, and m
tions for reargument asserting their Due Process right t
liberty of contract and to a remand for trial to cure de
nial of Due Process. In thus finding facts de novo the Stat
Supreme Court negligently exceeded its power and fail
fell as an appellate court under the State Constitution
[illegible] the Petitioners' [illegible] property
and also by this one-sided procedure [illegible]

record the said Court violated the requirement of fundamental fairness of Due Process, in a situation parallel to that of *Saunders* v. *Shaw*, and violated liberty of contract and property rights.

PRAYER FOR DUE PROCESS OF LAW.

Due Process of law in *principle* bars the State acting through its Supreme Court from taking away the Petitioners' liberty of contract and valuable property without a just trial of this case. The Petitioners pray the Supreme Court of the United States, by grant of certiorari and appropriate orders, to extend to them the *actual* protection of Due Process of Law under the Constitution of the United States as the supreme Law of the Land binding the Judges in each State.

Respectfully submitted,

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APPENDIX A.

DISPOSITION IN COURT
OF
DEFENSIVE ISSUES PLEADED
ON WHICH
SPECIAL FINDINGS WERE REQUESTED
BUT WERE NOT MADE
BY THE CHANCELLOR
AS TRIER OF FACT

TEXT OF LETTER FOR REFERENCE

APPENDIX A.

ISSUES OF FACT PLEADED BY PETITIONERS' ANSWER (R. 19-42).

WITH REQUEST AT OPENING AND CLOSE OF TRIAL (R. 41-42, 210)

FOR SPECIAL FINDINGS OF FACT BY CHANCELLOR AS TRIER OF FACT, AS REQUIRED BY SECTION 1390, MISSISSIPPI CODE, 1942,

AND DISPOSITION THEREOF BY THE CHANCELLOR AND BY THE STATE SUPREME COURT

FIRST DEFENSE.

PETITIONERS' PLEADING.—In their answer the issues pleaded were:

The Petitioners "made no complete and final offer" to the Respondent "prior to their draft of the 'Agreement and Warranty Deed Covering Land' of April 13, 1957" (R. 41-42, 29, 38, and 63-76, giving text of said proposed "Agreement and Warranty Deed").

The letter of March 2, 1957, giving the proposed terms of sale for cash did not contain all the essential terms proposed, and the Petitioners' letter of March 5, 1957, stipulated that no obligations were assumed before actual payment of the purchase money, and that the offer to negotiate of March 2nd was a simple offer without consideration and was revocable at any time before payment (R. 24, 28, 33).

The Respondent complained of hardship to his family (R. 36), and Petitioners then again proposed (R. 36) a

Family Settlement on reasonable terms, including the stopping of the unfounded suit over what person was "Rosalind Gwin Hutton", and who was "Rosalind Gwin Hutton III" (R. 33, 55); and the two March 2nd letters were an incomplete part of the proposal and transaction (R. 27, 32, 34-38).

The two March 2, 1957, letters (which were delivered manually to Respondent at the same time, R. 241, 242), contained a condition precedent to opening negotiations, namely:

(1) Making by Respondent of written apology for insults before negotiations to sell land would begin (R. 27, 28, 34); and

(2) Payment by Respondent of the defaulted note held by the Estate (R. 27).

These same conditions are reiterated in the March 5, 1957, letter to Respondent from J. B. Hutton, Jr. (R. 28, 59).

The March 2nd letter by Petitioners on proposed sale terms was written to enable the Respondent to apply for a loan and to see whether he could raise the purchase price, and was not written or understood as an offer open for binding acceptance by a promise to pay, or in any other way beside actual payment in exchange for a deed to be agreed upon: no contractual intent was present or shown by it to enter an executory, legally binding agreement (R. 27, 28, 31).

As stated, the March 5, 1957, letter from Petitioners to the Respondent also gives the conditions of negotiation and proposed sale for cash, and was written before the resale opened (said required apology having been written, quired apology was made and negotiations for the land

March 8, 1957, and accepted March 20, 1957) (R. 28). These conditions were part of Petitioners' offer to negotiate, proposed not in a contract document but in a series of letters discussing the proposal, in none of which is the intention shown of constituting the letters into a contract summing up and integrating the proposed terms as binding and accepted by the parties to a contract (R. 28, 59).

PETITIONERS' EVIDENCE. — The Petitioners' first letter of March 2, 1957, is in evidence showing a written apology was a condition precedent to transaction of any business whatever (R. 241-242), and the evidence also shows that this letter was delivered by hand to Respondent, along with the second letter of March 2, 1957, stating the proposed terms and price (R. 241). To the required apology dated March 8, 1957, which was mailed by Respondent to Mrs. Johnson in Jackson, Mississippi, Mrs. Johnson stated by letter of March 9, 1957, that she would forward it to Maryland to J. B. Hutton, Jr., and that a reply would be made when he received it. Petitioners made this reply on March 20, 1957, and stated that work had begun on the deed, thereby indicating acceptance of the apology and the opening of negotiation of the proposed land sale (R. 268, 269, 296, 297, 382). The evidence shows also that Respondent stated he received on March 10, 1957, J. B. Hutton, Jr.'s letter of March 5, 1957, stipulating that the proposed sale was for cash without obligation on Petitioners until cash was paid in full for the deed (R. 270). This is significant as showing before the apology had been accepted and negotiations had begun the Respondent had in his hands the said letter of March 5th and he knew the Petitioners' intentions not to be obligated before actual cash payment.

As a part of their answer, Petitioners made formal tender and offer to prove the exhibits (R. 45-78), attached

to the answer, as permitted by cited Mississippi statute (R. 44), These documents were offered to show there was no contractual intent in the March 2, 1957, letter on price to make a final offer, but that the Petitioners' final offer was drawn up in the 6-page draft of an "Agreement and Warranty Deed" submitted to Respondent on April 13, 1957; and that the Respondent inequitably misled them in his inconsistent conduct in the proposed Family Settlement.

Then at the trial, the Petitioners offered to prove Exhibit 6, the letter of January 29, 1957, proposing a Family Settlement (R. 55), and also a similar letter of January 14, 1957; but both letters were excluded on objection of Respondent's counsel to any letters before March 2, 1957 (R. 324, 355, 357-360); but were admitted for identification (R. 388).

The Chancellor ruled that evidence of prior letters was inadmissible, and excluded same, because he said the letter of March 2, 1957, giving the proposed price was not ambiguous and could not be added to and was not subject to interpretation (R. 359-360), thereby closing all avenues of proof to the pleaded issue of want of contractual intent and of no integration of the March 2 letter into any writing or series of writings constituting a contractual offer or contract. The Chancellor confused Petitioners' intent not to create a contract by their writing the simple letter of March 2nd on negotiation with the general rule excluding parol evidence of intent in using the language in some established and clear contract

Therefore, on this crucial issue the series of letters made exhibits, as Exhibit 6, letter of March 29, 1957, and similar letters, as that of January 14, 1957, was excluded, and proof of the conditions, representations, and terms of the proposed Family Settlement was shut out because of the conclusive presumption, begging the question at issue

that the letter of March 2, 1957, was a final offer to contract, beyond rebuttal showing the real intent and purpose of the parties in writing it.

The materiality of this evidence and of offered but excluded testimonial evidence appears in the recitals in both the draft of a deed prepared by the Respondent and also in the draft prepared by Petitioners, reciting that Mrs. Rosalind Gwin Hutton Johnson was the intended devisee of the land willed to "Rosalind Gwin Hutton", as the court decree of March 1, 1957, had held and not Respondent's Daughter, Rosalind Gwin Hutton, III. These recitals support the Petitioners' allegation that recognition of this decree of March 1, 1957, was understood to be one of the chief points of the proposed Family Settlement. These drafts of deeds are in evidence (R. 276, 64, 251); but the legal effect and significance is made unmistakable from the excluded letters and testimony to verbal acts of the parties to the transaction, making cessation of litigation by Respondent against Petitioners an essential condition of the whole proposed Family Settlement.

But the foregoing was harmless error in the trial Court because the decree was in favor of the Petitioners whose evidence was excluded. However, the erroneous exclusion of the evidence becomes prejudicial when the decree of the Chancellor for the Petitioners is reversed and the appellate court undertakes to decide issues of fact on a restricted record. Therefore, Petitioners must have a new trial and an opportunity to re-offer this evidence, and to have findings made, if a fair trial is to be given.

Again, the Petitioners sought to show and asked questions of three witnesses and actors in the transaction of March 2, 1957, namely, the Respondent himself, as a witness, and Mr. Russ M. Johnson, and J. B. Hutton, Jr., to

show the intent of the parties on the status of the simple two letters of March 2, 1957, offering to negotiate, and to put the letter on price in a form to be used in a loan application, without obligation on Petitioners, and that same were not intended to be contract documents. But the Chancellor, on objection of the Respondent, completely excluded all questions of these witnesses to the entire transaction of March 2, 1957.

Petitioners' counsel asked the Respondent whether, when he offered to buy the land on March 2, 1957, it was his intention to stop litigation as to the land title or to continue it. Respondent's counsel objected, and the Chancellor sustained the objection, after argument. The Chancellor said, You have nothing but his word for it, he could say he did not intend to stop the litigation (R. 329). Then the Petitioners' letter of January 29, 1957, was offered on the "meaning and intention and interpretation, the surrounding circumstances, where the contract is in dispute as to the intent and purpose of the parties" (R. 324); Respondent objected; and the Chancellor sustained objection and excluded the evidence. Similar questions as to the understanding and agreement to end litigation were attempted in the examination of Mr. Russ M. Johnson and J. B. Hutton, Jr., but the examination was not permitted (R. 377, 353).

DENIAL OF DUE PROCESS FROM CHANCELLOR'S CONCLUSIVE PRESUMPTION OF CONTRACTUAL INTENT IN EXCLUDING EVIDENCE SHOWING NON-CONTRACTUAL PURPOSE AND INTENT. — To the Petitioners' question to the Respondent as a witness as to whether there had been other efforts to buy this land before March 2, 1957, Respondent's counsel objected that to go back of March 2, 1957, was incompetent, saying "parties are presumed to say what they intend regardless of cir-

cumstances"; and the Court ruled that any details prior to the immediate circumstances were incompetent (R. 327), and then sustained objection to question as to when he had tried to buy the property (R. 328).

Petitioner, J. B. Hutton, Jr., as a witness, offered to introduce into the record the series of letters exchanged between Respondent and himself showing the letter of March 2, 1957, is not and was not intended to be a contract (R. 354, the objection cutting into the question). The Chancellor said it appeared to him that prior letters were merged in the "offer", and should have been put into the "offer", and that no ambiguity had been "cited" in the "offer" (R. 355).

The Chancellor assumed the March 2 letter was a "contract", the point in issue, as the reason for excluding all the Petitioners' evidence to show a different purpose was intended, namely, to show willingness to forget the insults if an apology was made and to enable the Respondent to apply for a loan to see if he could raise the purchase money. The Chancellor said, "the full offer as made by them is stated by their letter of March 2nd." (R. 356). "It would appear to me that this offer is made just flat out", but that he would not prejudge the matter (R. 357-358). However, the Court excluded the letters showing the intention of the Petitioners to end the litigation as the condition of negotiations (R. 360), because "the offer made in the letter of March 2nd is clear and unambiguous and would not be subject to any interpretation or anything else. All of the offer is clear on its face" (R. 360).

Thus, both testimonial evidence and also the letters of January 14 and 29, 1957, proposing an end of litigation and a Family Settlement with Respondent were excluded. This cut off all proof that the two March 2 letters as to

required apology and stating the proposed price were not written for the purpose of making a final or complete offer to sell but were only an offer to negotiate, expressing willingness to accept an apology and then only to negotiate.

This simple note of March 2nd stated: We will sell for cash; and was but one in a series of letters urging a settlement of claims, where there was no proof of final integration of the letters into a complete contract. This ruling of the Chancellor in effect adopted a conclusive and an arbitrary presumption that this simple note was written with contractual intent to be bound by a promise to pay, excluding explanatory and rebutting evidence of a different intent, and hence is a denial of Due Process.

NO RULING OF CHANCELLOR ON THE FIRST DEFENSE. — The Chancellor stated this defense in substance, viz., "that the offer of March 2 was modified by the letter of J. B. Hutton, Jr., of March 5, 1957, prior to any acceptance by the Complainant" (R. 398); but the Chancellor made no further comment or finding on this first defense of the Petitioners.

Instead, he ruled (on the second defense), that "no binding contract to sell resulted from the offer of March 2, 1957, and the purported acceptance thereof as contained in Complainant's letter of March 6, 1957," because the alleged acceptance "changed the terms thereof materially" (R. 404), in that it "provided that payment would be made by cashier's checks", and "did not accept the offer requiring cash to be paid" (R. 403).

Therefore, it appears that no other defense was made subject of a finding by the Chancellor, and the Chancellor expressly stated no finding was necessary as to Respondent's inequitable conduct as alleged by Petitioners.

FINDING *DE NOVO* AND DECISION OF STATE SUPREME COURT ON FIRST DEFENSE. — On the first defense of the Petitioners, the State Supreme Court found and held: "Beyond question, the Appellees [Petitioners here] by their letter of March 2, 1957, made an *unconditional* offer to sell to appellant, by warranty deed, their rights in the 507 acres of land, more or less, devised them by their Mother, for $30,000 cash * * *" (Italics added).

Thus, this issue was found against the Petitioners without the required findings by the Chancellor on an erroneously restricted record, nullifying contrary to Due Process the undisputed condition of March 2nd requiring written apology before negotiations opened, and also nullifying the March 5th letter defining the proposed sale for cash as without obligation until cash was paid.

ORDER DENYING REMAND FOR TRIAL OF DEFENSIVE ISSUES OF ANSWER. — On motion for new trial to implement Due Process rights asserted in the Suggestion-of-Error of Petitioners, the Petitioners asked for remand for plenary trial *de novo* "in order that the complete set of letters, and acts of the parties, verbal acts and *res gestae* may be developed on the issues of the case, especially as to the intent of the parties, and as to what documents properly constitute the Appellees' [Petitioners' here] offer to negotiate and the Appellant's alleged acceptance." The present record shows that the Chancellor exercised his discretion to exclude evidence in support of the pleadings of the Appellees and the exhibits to their answer. The entire transaction is competent and will demonstrate that the parties to this case never came to an agreement, there was no meeting of the minds and intentions of the parties on any agreement, and the action of the Appellant should be dismissed." (R. 485)

On May 2, 1960, and again on July 11, 1960, the State Supreme Court made an order refusing trial of the said defenses of Petitioners' answer and exhibits, pretermitted by the Chancellor (pp. B-26, B-27, below).

DENIAL OF FAIR TRIAL AND DUE PROCESS ON FIRST DEFENSE. — On the foregoing matters of this record, the Petitioners have had no required findings at the trial, and no opportunity to object to exclusion of evidence vital to their defenses, since Petitioners won in the trial Court, and the error was harmless in a proper appeal reviewing said decree. But the combined effect of the exclusion of the evidence at trial which supported the defensive issues, and of the reversal of the decree and making of findings *de novo* on these issues in the appellate Court deprives the Petitioners of a fair trial and Due Process guaranteed by the Fourteenth Amendment as declared in a similar situation in *Saunders* v. *Shaw*, and deprives them of the right to findings by the Chancellor, required by the Mississippi statute and the appellate limitation on the power of the State Supreme Court, as a matter of procedural Due Process. Cf. *Kelley* v. *Everglades Drainage District*, on invalidity of a judgment made without required findings of fact.

SECOND DEFENSE

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent's "letter of March 6, 1957", alleged to be a binding acceptance, "is a counter-offer and is not an acceptance of terms proposed or offered by" the Petitioners (R. 26, 42).

In particular, the said letter of March 6, 1957, is not a legal acceptance because no final, complete offer by Pet-

tioners had been made (R. 25); because it does not purport to be and is not an acceptance of terms proposed by the Petitioners (R. 25); because it states on its face it is an acceptance as per "this" letter, of March 6, 1957, when reasonably read in its own context, in which "this" in the letter itself refers to "this" letter of March 6, 1957, acknowledging receipt of "your" letter of March 2 (R. 25); and because it makes a counter proposal of a promise to pay, as distinguished from actual cash payment (R. 25), and the land description in the proffered deed drafted by Respondent is incorrect (R. 23), calling for conveyance of mineral rights not owned by Petitioners, and not offered for sale, but belonging to C. D. Hutton and Mrs. Susan Smith; and also because cashier's checks were proposed in place of cash, cashier's checks being subject to stop-payment by a bill to enjoin payment, and subject to solvency of the cashier.

FINDING OF THE CHANCELLOR. — While the Chancellor did not expressly construe the phrase "*as set forth* in *this* letter", in Respondent's March 6th letter,[1] by necessary implication he construed it as a restrictive qualification confining his proposition to the very terms set forth in "this" letter of March 6th, substituting cashier's checks for cash, and therefore a material variance.

The Chancellor did not notice the substitution of a promise to pay in place of the act of cash payment which last Petitioners stipulated, and did not notice the dis-

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[1] ... March ... 1957 ...

"This is to acknowledge receipt of your letter of March 2 1957. I hereby accept your offer as set forth in this letter ... etc." giving his counter terms (R. 400). Then follow the state-ment. Upon execution of the deed I left with Mr. ... I will deliver ... a cashier's check for $30,000 etc. ... (R. 400) (Italics added)

crepancy in interests to be granted under Respondent's draft of a deed from Petitioners' proposal only to sell their interests, the Respondent's draft including interests of C. D. Hutton and Susan Smith in minerals (R. 23).

RULING OF STATE SUPREME COURT. — The State Supreme Court concluded that Petitioners did not mean cash by using the word "cash", "but if they did so intend, the Appellant would have had the right to conform thereto at the time of the exchange." (R. 438). The Court held that the time of exchange of cash for the deed did not come (R. 435), because the Petitioners "repudiated their agreement" (R. 435), and that the Petitioners were bound because the March 6th letter by Respondent was an unqualified acceptance (R. 436), and was not conditioned on following the directions and proposals contained in it, which the Court said Respondent "suggested" (R. 436).

REQUEST OF PETITIONERS' SUGGESTION-OF-ERROR. — The Petitioners' Suggestion-of-Error requested remand for trial of this issue as to the non-responsiveness of the purported acceptance. The most important of the defenses made here were that the March 6th letter preceded the making of the required apology of March 8th and acceptance of it on March 20th, that the Petitioners' March 5th letter stipulated that the cash sale meant a cash sale without obligation until cash was paid, and that the Respondent proffered his *promise* to pay in lieu of *actual* cash payment, and offered a deed including mineral interests not proposed to be sold. No finding was made in the trial court on these important issues, as required by Section 1390 Mississippi Code of 1942. Testimonial evidence was excluded as to the intent of the parties and the place in the negotiations this letter of March 6th actually had, as one of numerous proposals made by Respondent and not accepted by Petitioners. If the time for the ex

change of cash for a deed did not arrive, and it did not arrive, it was because the Respondent dropped the proposal for an amicable settlement, went back into the court fight, and failed to complete negotiations and conditions required by Petitioners. On these matters Petitioners are entitled to a finding after a fair trial.

THIRD DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent "made no valid acceptance" of Petitioners' "proposal for an agreement and deed of April 13, 1957" (R. 29, 31, 34, 42).

THE EVIDENCE. — The Respondent admitted at trial that he had expressly rejected the "Agreement and Warranty Deed Covering Land", prepared by Petitioners and sent to Respondent on April 13th, which Petitioners allege to be their only complete and final-form offer (R. 285, 286); although the Petitioners testified that they never received the alleged written rejection of May 30, 1957, as distinguished from rejection by ignoring it and refusing to comment, and Petitioners testified they knew nothing of the May 30, 1957, letter until the trial (R. 361-362, 379, 384-385).

NO FINDING OF CHANCELLOR. — This is another pretermitted issue, dependent of course on the first defense of the Petitioners, a finding on which was pretermitted. On this issue, except as to the cash requirement, the Chancellor made no finding or decision, but confined his ruling to the single point that the alleged acceptance did not comply with the proposal that cash should be paid, but substituted a counter proposal of payment with cashier's checks

FINDING OF STATE SUPREME COURT.—The State Supreme Court found *de novo* that the letter of March 2, 1957, stating the proposed price and the proposed terms was unconditional (R. 432), and on March 6, 1957, was unqualifiedly accepted (R. 436), and so has omitted this issue.

CONSEQUENCE OF COURT DECISION. — On this third defensive issue and its related issue, the first defense, Petitioners have had no trial, though moving for same in the motion implementing the Suggestion-of-Error, and in motions of June 28, 1960.

FOURTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded, "It is inequitable" for the Respondent to enter negotiations for an amicable settlement of litigated claims and for sale of land, and to attempt to hold the three Petitioners "as obligated to enter such contract and sale and to execute a deed, and pay him damages, and at the same time to litigate title to one share of the land" (R. 42). "Under all the circumstances the" Petitioners "considered and understood that by his said offer the" Respondent "accepted the decree of the Chancery Court confirming the title of Mrs. Johnson to 1/3 of the said land; and with this belief they opened negotiations on condition that first an apology in writing should be made, that the 1956 rent note should be paid and the 1957 note provided for, etc." (R. 38). Respondent "stands in an inequitable and inconsistent position" (R. 41). Petitioners "should not be misled by" Respondent "in offering to buy the three shares of the land as if he recognized title, dropping negotiations, reopening litigation by appealing from the decree that confirmed title to a share, and then demanding a deed to

the land a year and three months later, and demanding $10,000 damages for the delay while he was fighting the case on appeal attacking the title" (R. 40).

Respondent's inequity consists in dealing with Petitioners as and on the basis of members of the same Family negotiating an amicable settlement of all his claims, and then in attacking a Petitioner's title in his Daughter's name while trying to buy land from them in an amicable settlement, thereby deceiving and misleading them, and also speculating on the outcome of his pending lawsuit (R. 41).

Respondent as maker of notes due the Estate used the unfounded claim of his Daughter as alleged successor of the payee of the notes as an alleged reason not to pay the notes as maker into court. Respondent has not performed the condition made by Petitioners that he must pay the 1956 note and secure the 1957 note before they would sell their future interest in the said land, at expiration of his 1957 lease. Respondent has not met this condition in good faith (R. 41).

The Respondent "did not recognize then the title of Mrs. Johnson in 1/3 of the land as stipulated in correspondence between the parties and as set out in" Petitioners' "draft of a deed, but resumed his attack thereon by perfecting an appeal in the Supreme Court of Mississippi from April 26, 1957, until final decision on June 8, 1958, thereby breaking up the negotiations." (R. 22, 23, 26).

The Respondent from April 26, 1957, to June 9, 1958, claimed in court that title to 1/3 of the land was in his minor Daughter, and not in Mrs. Johnson, a Petitioner; but now he alleges that all this time he held a valid contract and equitable title to the land in his own name, and was willing to pay Mrs. Johnson all the while for her land while

he was fighting her in his Daughter's name, and he also now claims $10,000 damages for the delay while he was playing this game in court (R. 30, 39). In this course he misled and inequitably induced the Petitioners into believing he approved the decree finding Mrs. Johnson had title; and with this understanding the Petitioners undertook to negotiate a sale of the land; only to find that they had been inequitably misled (R. 37-38).

The Respondent has entered the land as a trespasser and has interfered with and prevented the Petitioners having the use and control of the land. This is not equitable (R. 22, 26, 39, 120).

PETITIONERS' EVIDENCE EXCLUDED.—The Chancellor excluded all letters and all testimonial evidence offered by the Petitioners to show that the Respondent and the Petitioners both proposed an agreement for the Respondent to stop litigating over the amount and the proper payee of the notes made by the Respondent, and over the well known identity in the Family of "Rosalind Gwin Hutton" as Mrs. Johnson, and not the Respondent's Daughter who is referred to in the Will as "Rosalind Gwin Hutton, III" (see page 222 of the present record giving photostatic copy of holograph Will so naming Respondent's Daughter). The negotiation of March 2, 1957, as to apology and land sale was on the day after the decree finding that Mrs. Johnson was "Rosalind Gwin Hutton", and as such owned the land. The drafts of deeds prepared both by Respondent and Petitioners stipulated that Mrs. Johnson owned the land (R. 276, 64, 251). But the Respondent reopened the legal attack on the decree and the title on April 26, 1957 (R. 339). This was contrary to the proposed agreement, and bars Respondent's enforcing the alleged Family Settlement Agreement, because it was never entered. It was merely proposed, and Respondent

dropped it. Petitioners then wrote Respondent that it had been closed.

EXPRESS AND INTENTIONAL OMISSION BY THE CHANCELLOR OF FINDING ON RESPONDENT'S IN. EQUITABLE CONDUCT ALLEGED BY PETITIONERS. BECAUSE UNNECESSARY IN RENDERING DECREE FOR PETITIONERS.—The Chancellor ruled:

> "Since there was no binding contract for the sale of said lands, it is unnecessary for the Court to pass upon the question as to whether or not the remedy of specific performance should be denied to the complainant because of any inequitable conduct on his part as alleged by the defendants." (R. 404).

FINDING *DE NOVO* BY STATE SUPREME COURT. THAT RESPONDENT ACTED EQUITABLY IN HIS MISLEADING TREATMENT OF PETITIONERS IN CHANGING HIS MIND ON STOPPING LITIGATION AND MAKING A FAMILY SETTLEMENT, AND NOW CHANGING IT AGAIN AND ALLEGING HE MADE A CONTRACT. —The State Supreme Court made the following finding *de novo* on a restricted record, and based judgment thereon:

> "Appellees [Petitioners] further say that Appellant [Respondent] was guilty of inequitable conduct on account of the fact that, subsequent to the contract, he appealed on behalf of his minor Daughter to the Supreme Court, in the case of Hutton v. Hutton, 293 Miss. 458, 102 So.2d 424, and thereby attacked the title of Mrs. Johnson; and besides, that he was in default in the payment of rents." (R. 438).

Then the State Supreme Court found that the Respondent had a right to appeal for his Daughter, and that this was equitable, and that non-payment of the notes also was equitable (R. 439). The Court gave inconclusive

reasons which ignore the restricted nature of the record from which evidence was excluded, which was offered to prove the issue of the conditions on which the Family Settlement was proposed, and whether Respondent had agreed with Petitioners on these conditions, including the dropping of further litigation on the unfounded claim for the Daughter based on the untrue allegation she was the only person named "Rosalind Gwin Hutton" and so was devisee. While Respondent had a right to appeal, he has no right to propose to agree to drop suit and pay his said notes for rent and then to drop this proposed agreement, fight on, and say he had agreed all the while!

CONSEQUENCE OF *DE NOVO* FINDING ON RESTRICTED RECORD THAT RESPONDENT'S TREATMENT OF PETITIONERS WAS EQUITABLE.—The consequence of the shift of ground of decision from the issue found by the Chancellor to the pretermitted issue of Respondent's inequitable treatment of the Petitioners, and the consequence of making a *de novo* decision on this issue on a record from which the evidence of inequitable conduct was offered but strictly excluded, is that the Petitioners have been denied completely any fair trial of this defensive issue which is a complete bar in law to the remedy of specific performance. And this is a denial of Due Process of Law.

FIFTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent has not paid the 1956 and 1957 rent notes held by the Estate, which payment was made a condition of completion of the proposed land sale within a reasonable time, and that such continued delay and default is not equitable (R. 25, 30, 42).

PETITIONERS' EVIDENCE.—Both the Petitioners' letters of March 2, on price and of March 5, 1957, make it clear that payment of the 1956 note which was past due and that securing the 1957 note were required before the Petitioners would sell their vested future interest in this land. It is not disputed that the notes are now unpaid.

CHANCELLOR'S FINDING ON NOTES.—The Chancellor made no findings as to the requirement that the rent notes must be paid to the Estate before the land would be sold by the Petitioners. He found no agreement was made between the parties in March, 1957. He did find that the Respondent offered no proof to support his pleaded claim of having paid part of the principal of the said notes, that the Executor was the holder, and he gave a decree for principal, interest and attorney's fees in favor of the Executor as holder of the notes (R. 405, 409, 410).

FINDINGS *DE NOVO* BY STATE SUPREME COURT THAT DEFAULT IN THE NOTES WAS NOT INEQUITABLE.—The State Supreme Court found that Respondent's default in payment of the rent did not render his conduct inequitable because payment of that obligation was provided for in the contract of sale (R. 439).

CONSEQUENCE OF DECISION OF STATE SUPREME COURT.—This finding that the Respondent's nonpayment of the rent notes, or the rent; was equitable is made on a restricted record and on a pretermitted issue. The finding deprives the Petitioners of an opportunity of showing by evidence that the payment of the notes to the Estate was made a precedent condition of the land sale by the Petitioners.

SIXTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent "has not used due diligence in negotiating the proposed sale to completion as required by the Petitioners' "offer to negotiate the sale on March 2, 1957" (R. 42). The Respondent dropped the proposed Family Settlement and has been an adversary in court since he decided on April 26, 1957, to appeal and attack the decree of March 1, 1957 (R. 30).

EVIDENCE AT THE TRIAL.—At trial the Respondent admitted attacking Mrs. Johnson's title on April 26, 1957 (R. 322, 323, giving date of bond for appeal as May 2, 1957; R. 339, giving April 25, 1957, as the day Respondent signed the papers, and April 26th as the day they were filed). Respondent testified that he wrote a letter and mailed it on May 30, 1957, rejecting Petitioners' April 13, 1957, draft of "Agreement and Warranty Deed Covering Land." (R. 285-286). Respondent took no further action until he lost his attack in his Daughter's name on Mrs. Johnson's title. Then in July, 1958, the present suit was filed. This delay is uncontroverted.

RULING OF CHANCELLOR.—The Chancellor made no finding or ruling on this defense.

FINDING OF THE STATE SUPREME COURT.—The State Supreme Court found *de novo* that the Petitioners had repudiated their agreement, although the issue had not been made subject of a finding, and the evidence of the transaction had been excluded. Nevertheless, the State Supreme Court held that the Respondent had six years in which to demand a deed, after the beginning of his attack, dropping negotiations and Petitioners' letters asking whether he had further interest, and closing the

negotiations when they heard nothing from him for approximately 6 weeks, April 13-May 31, 1957 (R. 438).

CONSEQUENCES OF DECISION.—The decision is believed to be unsupported by findings and evidence, and to be so extremely unreasonable as to be a complete denial of Due Process.

SEVENTH DEFENSE.

PETITIONERS' PLEADINGS. — The Petitioners pleaded that they "were entitled to close and did close the negotiations on May 31, 1957, without any breach of any duty to" the Respondent, "and without liability in damages to him, because the" Respondent "himself dropped negotiations and resumed litigation, instead of completing the proposed Family Settlement" (R. 25, 28, 29, 31, 38, 42).

The three parcels owned severally by Petitioners were too small to operate separately, and the Petitioners had agreed to cooperate with one another in managing the property; and therefore Respondent's attack on the title of one abandoned negotiations with all three of the Petitioners (R. 32, 40; 51, map).

PETITIONERS' EVIDENCE.—While the Petitioners' testimonial and written evidence was excluded, the part of the transaction reflected in the Petitioners' letters of April 13, 1957, and May 20, 25, and 31, 1957, shows *bona fide* exercise of the reserved right to revoke the negotiations stipulated in the March 5, 1957, letter to Respondent from J. B. Hutton, Jr. Respondent admitted making no reply to the series of letters except his alleged letter of May 30, 1957, that he had been away from home and made no effort to negotiate further (R. 272-273, 300-301, 298-299, 303-304, 285-286, 330-332).

CHANCELLOR'S FINDING.—The Chancellor made no finding on this defense.

FINDING *DE NOVO* OF THE STATE SUPREME COURT.—The State Supreme Court found on this pretermitted issue on a restricted record as follows:

> "Before the form of the deed was agreed upon, the Appellees [Petitioners] repudiated their agreement." (R. 435).

CONSEQUENCES OF DECISION.—On this record also the Respondent has a claim for $10,000 damages which has not been disposed of. The decision of the Court that Petitioners repudiated a legally binding agreement renders them finally and legally liable in damages to the Respondent in such sum as may be found on equitable principles. The judgment is prejudicial to Petitioners' property interests. Because it is based on no evidence, is not supported by required findings of fact, and exceeds the appellate authority of the State Supreme Court and also denies the fundamental fairness of the Due Process Clause of the Fourteenth Amendment which gives every litigant a trial of his defenses, the said judgment is believed to be invalid, and to be subject to correction by the Supreme Court of the United States under Due Process.

ISSUES IN ACTION ON RESPONDENT'S NOTES HELD BY THE ESTATE.

PLEADING OF THE EXECUTOR, ONE OF PETITIONERS.—The Executor pleaded that he is the holder of two negotiable notes totalling $3,200.00, both in default, made by Respondent on June 25, 1955, payable to Mrs. R. G. Hutton, and asked for judgment and equitable relief to enforce payment, and Petitioners sought to recover

possession of the land (R. 120-127). The declaration set out facts negativing the defensive facts alleged by the Respondent (R. 165), showing the agreed rent each year was $2,000.00 and the said two notes each for $1,600.00 were for the balance of rent, and that no payments thereon had been made by Respondent (R. 166-168). The Petitioners denied that the obligation of Respondent to pay the notes was based on any agreement whatever with them, either proposed or made, in March, 1957 or otherwise (R. 169). The Executor sued for principal, interest and attorney's fees (R. 169-170).

EVIDENCE FOR THE PETITIONERS.—The evidence for the Petitioners showed the written lease, the notes, nonpayment, and title of the Executor to the notes (R. 342-353, 367-371).

FINDING OF CHANCELLOR.—The Chancellor found the Executor was the holder, that the claimed set-off of payment by Respondent had not been sustained and no evidence of it was offered, and gave judgment for the Executor (R. 409, 405).

FINDING *DE NOVO* BY STATE SUPREME COURT. —The State Supreme Court made a brief finding reversing the Chancellor as to "rent, interest thereon, and attorney's fees." The Court stated: "If specific performance had been required, simultaneously with the consummation of the contract, the obligation for rent would have been paid and discharged in accordance with the terms of the contract" (R. 439). The Court stated that the Executor sued the Respondent "for the recovery of the rent notes" (R. 430), and that the Chancellor "awarded a decree for the rent and interest and attorney's fees" (R. 431). The Chancellor also awarded rent for the year 1958 (R. 408). Whence it appears that the Court reversed the Chancellor

as to the rent notes, and principal, and interest, but the point as to the principal is unclear. The reversal as to interest and attorney's fees is quite clear.

CONSEQUENCES OF THE JUDGMENT OF THE STATE SUPREME COURT AS TO THE RESPONDENT'S NOTES HELD BY THE ESTATE.—The judgment annuls the obligation of the contract made by the Respondent to pay interest and attorney's fees. It may annul the obligation to pay the principal of the notes if "rent" means rent for 1956 and 1957, as used in the decision. The Executor holds a decree in the Chancery Court for principal and interest and attorney's fees, $3,907.00 as of March 1, 1959 (R. 409). The Chancellor found no evidence of claim of set-off was offered and that the Executor is the legal holder. No evidence whatever is in the record reducing the Executor's right to the full amount of the notes. Therefore, the *de novo* finding of the State Supreme Court on a restricted record and without evidence is a denial of property without Due Process under the Fourteenth Amendment, or is a judicial abrogation of the obligation of contracts.

EXHIBIT 6 TO THE ANSWER.

(In Part.)

"January 29, 1957

"Mr. S. D. G. Hutton
Tchula, Mississippi

"My dear Sam:

"In effect you state in recent letters that a 1958 lease to the 209 acres is necessary for continuance of your livestock business, and for J. B. Hutton 3rd to go to college in 1958."

* * *

"If now you recognize Rosalind's ownership, which a lease would admit, discontinue the legal claims as to the land and the 1956-7 rent balances, pay the amounts now legally due, pay or secure the amount that will be due November 1, 1957, I offer you either a 1-year or 2-year lease or sublease for rent paid cash in advance at the same rental without discount you agreed to pay Mrs. Rosalind Gwin Hutton for 1956-1957."

* * *

"To put recognition of ownership of the land by Rosalind in proper form, which recognition would be implied by a lease, a consent decree to the pending petition should be signed by yourself, subject to the approval of the Chancellor, to the effect that the will devises the land to Rosalind, (and not to Rosalind III, as the Testatrix referred to the Granddaughter in the will). I have conclusive proof that the Testatrix intended to will the land to Rosalind, and not to the Granddaughter, Rosalind III, and I will exhibit this to the Chancellor."

* * *

"Yours truly,

s J. B. Hutton Jr.
J. B. Hutton Jr."

(Full text of letter is given on page 55 of the Record.)

APPENDIX B.

OPINIONS OF CHANCELLOR AND OF STATE SUPREME COURT, ITALICIZED TO SHOW POINT DECIDED BY CHANCELLOR AND ALSO PRETERMISSION BY HIM OF FINDINGS ON ISSUES OF FACT REQUESTED AND TO SHOW FINDINGS DE NOVO BY STATE SUPREME COURT IN EXCESS OF ITS AUTHORITY.

FINAL ORDERS AND DECREES UNDER REVIEW.

IN THE CHANCERY COURT OF HOLMES COUNTY, MISSISSIPPI.

S. D. G. HUTTON vs. J. B. HUTTON, JR., ET ALS	No. 9749
J. B. HUTTON, JR., EXECUTOR vs. S. D. G. HUTTON	No. 9811

OPINION OF THE COURT.

The Complainant S. D. G. Hutton, filed his bill in Cause No. 9749 on August 23, 1958, against J. B. Hutton, Jr., Mrs. Rosalind Gwin Hutton Johnson, and Mrs. Mary Ryburn McCutchan praying for the specific performance of a contract to sell the lands described in the bill and for damages for their delay in executing a deed to said lands. The Defendants filed their *answers* and *denied* that their offer to sell said lands *was accepted* by the complainant. They *alleged* that complainant's letter of March 6, 1957, in reply to letter of March 2, 1957, *did not accept* the offer unequivocally and unconditionally according to its terms, but *amounted to a counter proposal* or rejection of their offer and that the *offer of March 2nd was modified by the letter of J. B. Hutton, Jr., of March 5, 1957, prior to any acceptance by the complainant. They further alleged that complainant had never accepted the offer as modified and that on May 31, 1957, all offers to sell were withdrawn* by the defendants. *They further alleged* the *complainant was not entitled* to decree for *specific performance on account of his inequitable conduct.*

On October 4, 1958, complainant amended his bill to make J. B. Hutton, Jr., Executor of the Estate of Mrs. Rosalind Gwin Hutton, deceased, a party defendant.

On November 7, 1958, the defendants filed a cross-bill praying for damages or double rent for the use of said lands for the year 1958, in the sum of $4000.00 and for other relief. Cross-Defendant filed his answer denying the allegations of the cross-bill and that cross-complainants were entitled to the relief prayed.

On September 3, 1958, J. B. Hutton, Jr., Executor of the Estate of Mrs. Rosalind Gwin Hutton, deceased, filed a suit in the Circuit Court of Holmes County, Mississippi, being Cause No. 5764 on the docket of said court, against S. D. G. Hutton on two promissory notes dated June 25, 1955, for the sum of $1600.00 each, due on November 1, 1956 and November 1, 1957, bearing interest at the rate of 6% per annum after maturity and providing for 10% attorney's fees if placed in the hands of an attorney for collection. The defendant filed his answer and claimed a set-off in the sum of $746.68. On October 10, 1958, an order agreed to by all the parties was entered transferring said cause to this Court, the same being docketed as Cause No. 9811 on the docket of this court.

By agreement, these two causes were consolidated for trial.

On March 2, 1957, the defendants wrote the following letter to S. D. G. Hutton, and the same was delivered to him by Mr. Russ Johnson, husband of one of the defendants:

"March 2, 1957—Mr. S. D. G. Hutton, Tchula, Mississippi. Dear Sam: We will sell our rights by warranty deed in the 497 acres, more or less, (consisting of 209 acres of cultivated land and 298 acres of wood-

land), being the land devised us by the will, of Mrs. R. G. Hutton, and duly described in it, for $30,000 cash, reserving our mineral rights therein as given in the will. We will waive interest and fees on the 1956 rent note, and accept $1600 principal, as offered by you. We will ask you to pay the $1600 balance of 1957 rent agreed to with Mother and due 1 November 1957, because this item is governed by the will, as an asset applicable to estate debts, and the balance thereafter left is 1 4th Susan's. We will pay 1957 taxes. We would like for you to accept this offer, or decline it by letter within 2 weeks, and hold the offer open that long. If you accept it, and use due diligence, we will of course give reasonable time to close the transaction. Yours sincerely, J. B. Hutton, Jr.—Mary Ryburn Hutton McCutchan—Rosalind Hutton Johnson—"excluding of course the 112 acres in the cypress brake in a separate tract."

At the same time another note was delivered to the complainant demanding that he apologize to and retract statements made to Mrs. McCutchan and Rev. Charlton Hutton on *March 1, 1958*. The terms of this note were complied with and will not be copied herein.

On March 6, 1957, S. D. G. Hutton wrote the following letter to the defendants, to-wit:

"Dear Jim, Rosalind, and Mary Ryburn,—This is to acknowledge receipt of your letter of March 2, 1957. I hearby accept your offer as set forth in this letter. Upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday, March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00, and also a cashiers check for $3,200.00 to cover rent for 1956 and for 1957. Please have Mr. Cox notify me by telephone at 4071 Tchula (Collect) when he is ready for me to deliver checks. Yours truly, S. D. G. Hutton."

These two letters are relied upon by the complainant as constituting a contract to sell the lands mentioned in the offer of March 2, 1957, and described in the original bill.

On March 4, 1957, the complainant took to the office of Mr. Harold Cox, an attorney at Jackson, Mississippi, a deed from the defendants to the complainant, together with an escrow agreement. This was the deed referred to by the complainant in his letter of March 6, 1957. The deed and escrow agreement were as follows, to-wit:

"WARRANTY DEED

"For and in consideration of THREE THOUSAND AND NO 100 DOLLARS ($3,000.00), cash in hand to us paid, the receipt of which is hereby acknowledged and other good and valuable considerations, the receipt and sufficiency of which are also hereby acknowledged: we, J. B. Hutton, Jr., Rosalind Hutton Johnson, and Mary Ryburn Hutton McCutchan, do hereby sell, convey, and warrant, subject to the exceptions and reservations herein provided for, unto S. D. G. Hutton, the following described land situated in Holmes County, Mississippi, to-wit:

"A tract of land containing 507 acres, more or less, in Section 15, Township 15 North, Range 1 West, being all that part of said Section 15, lying South of Tchula Lake, North of the South line of Lots 15, 16, 17 and 18, and West of a North and South line located 4200 feet East off the West line of said Section 15; and being Lots 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17, 18, and a strip off of the West side of Lots 6, 7, 14, and 15, of said Section 15, Township 15 North, Range 1 West. The foregoing land *being all* of the land owned by the late Mrs. Rosalind Gwin Hutton in Section *15*, Township 15 North, Range 1 West, at the time of her death, and which was devised to the grantors under Item III of the Last Will and Testament of the said Mrs. Rosalind Gwin Hutton

"The undersigned Rosalind Hutton Johnson is the same person as 'Rosalind Gwin Hutton' mentioned in Part 1 of Item III of said Last Will and Testament.

"The warranty herein contained is limited, as to each of the grantors, to that part of said lands owned by each of the granters.

"The grantors except from this conveyance and reserve unto themselves all of their respective mineral rights in and to said land.

"WITNESS our signatures on this the day of March, 1957.

J. B. Hutton, Jr.

Rosalind Hutton Johnson.

Mary Ryburn McCutchan."

(Acknowledgement Omitted)

"ESCROW AGREEMENT

"TO:

"Gentlemen:

The undersigned J. B. Hutton, Jr., Rosalind Hutton Johnson and Mary Ryburn Hutton McCutchan, hereinafter referred to as Sellers and S. D. G. Hutton, hereinafter referred to as Buyer, hand you herewith a warranty deed executed by the Sellers to the Buyer,

covering 507 acres of land, more or less, in Holmes County, Mississippi.

If, on or before September 1st, 1957, the buyer pays to you for delivery to the Sellers, the sum of $30,000.00, you are to deliver said deed to Buyer. If, by September 1, 1957, said sum of $30,000.00 has not been paid to you by Buyer as aforesaid, you are to deliver said deed to Sellers.

J. B. Hutton, Jr.

Rosalind Hutton Johnson

Mary Ryburn Hutton McCutchan

S. D. G. Hutton."

The offer of March 2, 1957, to sell was for $30,000.00 *cash* and the payment of the rent notes for 1956 and 1957. It will be noted the complainant's letter stated that, upon the execution of the deed left with Mr. Cox, he would deliver to Mr. Cox a *cashier's check* for $30,000.00 for the deed and *a cashier's check* for $3,200.00 to cover rent for 1956 and 1957.

The acceptance of an offer to sell must be in accordance with the terms and condition of the offer and must be unequivocal and unconditional. It cannot provide different or additional terms. If the acceptance changes any of the terms of the offer or adds other terms thereto

amounts to counter proposal or a rejection of the offer. In such a case the offer cannot be later accepted unless it be renewed by the offeror.

The purported acceptance in this case did not accept the offer requiring cash to **be paid**, but provided that payment **would be made** by Cashier's Checks.

> "A tender of a cashier's check is insufficient acceptance of the offer in option requiring optionee to tender agreed amount either in cash or by certified check prior to expiration of time specified." Words & Phrases, Vol. 6, page 259.

> "A cashier's check is merely a bill of exchange drawn by a bank upon itself." Lundy v. Greenville Bank & Trust Co., 174 So. 802, 179 Miss. 282.

The deed and escrow agreement were delivered at the same time to Mr. Cox by the Complainant to be executed by the defendants as referred to in his letter of March 6, 1957, to the defendants. The deed called for a cash consideration of $3,000.00 paid upon execution of the deed and recites other good and valuable consideration. The escrow agreement called for the executed deed to be delivered to an escrow agent to be delivered to complainant upon payment of the sum of $30,000.00 on or before September 1, 1957. Upon failure to make payment by said date, the deed was to be returned to the defendants. The deed and escrow agreement made no mention of the payment of the two rent notes in the sum of $3,200.00 for the years 1956 and 1957.

The letter of March 6, 1957, purporting to accept the offer of March 2, 1957, *was not an unconditional acceptance of the offer*, but *changed the terms thereof materially*. This letter constituted a *counter proposal* and amounted to a *rejection* of the original offer of March 2, 1957. *The*

offer of the defendants not having been accepted according to its terms, the defendants were not bound thereby.

The Court is of the opinion that *no binding contract to sell* resulted from the offer of defendants of March 2, 1957, and the purported acceptance thereof as contained in the complainant's letter of March 6, 1957. The specific performance of said contract and the demand of complainant for damages will be denied.

Since there was no binding contract for the sale of said lands, *it is unnecessary for the Court to pass upon the question as to whether* or not the remedy of *specific performance* should be *denied* to the complainant *because of any inequitable conduct on his part as alleged by the defendants.*

The defendants and cross-complainants in their cross-bill demanded damages or double rent for the use of said lands by the complainant and cross-defendant for the year 1958 in the sum of $4,000.00. The evidence shows that a reasonable rent for said land is the sum of $2,000.00 per annum. There is no proof of notice to the complainant and cross-defendant to quit the premises. The defendants and cross-complainants, J. B. Hutton, Jr., Mrs. Rosalind Gwin Hutton Johnson and Mrs. Mary Ryburn Hutton McCutchan, are entitled to recover from the complainant and cross-defendant the sum of $2,000.00 for the use and occupancy of said land for the year 1958, with interest thereon at 6% per annum from January 1, 1959. Cross-complainants are entitled to a writ of possession putting them in possession of said lands.

The original bill in Cause No. 9749 should be dismissed and the attachment levied therein should be quashed and discharged, and the defendants and cross-complainants are entitled to recover the sum of $2,000.00 with interest

at 6% per annum from January 1, 1959, and all costs hereof for which let execution issue.

In Cause No. 9811, the Court finds that J. B. Hutton, Jr., *Executor* of the Estate of Mrs. Rosalind Gwin Hutton, deceased, *is* the *legal holder* of the two rent notes and is entitled to maintain his suit thereon. *The Defendant offered no testimony to substantiate his claim of set-off.* Said notes have not been paid, and the plaintiff is entitled to recover of and from S. D. G. Hutton, defendant, the principal sum of $1,600.00 principal on *each* of said notes, being in the total principal sum of $3,200.00, together with *interest* at 6% per annum from maturity of each of said notes, together with *an attorney's fee* in the amount of 10% of the total amount of principal and interest due thereon.

The solicitors for the defendants and cross-complainants in Cause No. 9749 and for the plaintiff in Cause No. 9811 will draw decrees in both causes in accordance with this opinion. The decrees shall be drawn without delay and submitted to counsel opposite for their approval or objection as to form before submitting the same to the Chancellor for his signature.

Rendered at Yazoo City, Mississippi, this the 6th day of February, 1959.

s/ C. D. Williams,
Chancellor.

IN THE SUPREME COURT OF MISSISSIPPI

No. 41,428

S. D. G. HUTTON

vs.

J. B. HUTTON, JR., EXEC. OF THE ESTATE OF MRS. ROSALIND GWIN HUTTON, DECEASED, ET AL.

LEE, JUSTICE:

Sam D. G. Hutton, by his bill of complaint against J. B. Hutton, Jr., Mrs. Rosalind Hutton Johnson, and Mrs. Mary McCutchan, sought to require specific performance by them of an alleged executory contract to sell to him a 507 acre tract of land, known as the Cooper Place, in Holmes County, Mississippi.

The defendants had received their interest in this land under the last will and testament of their mother, Mrs. Rosalind Gwin Hutton, who died on November 23, 1955. The testatrix had divided the place into three separate tracts, insofar as the surface was concerned, and had left the east 169 acres to Mrs. Johnson, the center 169 acres to Mrs. McCutchan, and the west 169 acres of J. B. Hutton, Jr. Insofar as mineral rights were concerned, the place was divided into five separate tracts of 101 2/5 acres each, and these rights in those tracts were devised to Sam, Mrs. Johnson, Mrs. McCutchan, Susan Van Houten Smith, and Charlton D. Hutton.

The alleged contract to sell arose in this way. On March 2, 1957, Sam, from Tchula, Mississippi, called his brother-in-law, Russ M. Johnson, husband of Mrs. Rosalind Hutton Johnson, over the telephone at Jackson and expressed his desire to buy the Cooper Place. Johnson let the defendants, who were all in the city at the time, know what had happened and they, in turn, formulated their

proposition for the sale, based on two letters, which Johnson, by prearrangement, delivered to Sam at Canton that afternoon.

The letters were dated March 2, 1957. One was as follows: "Dear Sam: Before we transact business with you it will be necessary for you to give written expression of regret for and retraction of the statements you made to Mary Ryburn and Charlton on March 1, 1957. Yours sincerely, s Rosalind s Jim." The other, signed by J. B. Hutton, Jr., Mary Ryburn Hutton McCutchan and Rosalind Hutton Johnson, was as follows: "We will sell our rights by warranty deed in the 497 acres, more or less, (consisting of 209 acres of cultivated land and 298 acres of woodland), being the land devised us* by the will, of Mrs. R. G. Hutton, and duly described in it, for $30,000 cash, reserving our mineral rights therein as given in the will. We will waive interest and fees on the 1956 rent note, and accept $1600 principal, as offered by you. We will ask you to pay the $1600 balance of 1957 rent agreed to with Mother and due 1 November 1957, because this item is governed by the will, as an asset applicable to estate debts, and the balance thereafter left is 1 4th Susan's. We will pay 1957 taxes. We would like for you to accept this offer, or decline it by letter within 2 weeks, and hold the offer open that long. If you accept it, and use due diligence, we will of course give reasonable time to close the transaction. *excluding of course, the 112 acres in the cypress brake in a separate tract."

On March 4, 1957, Sam wrote as follows to Mrs. Johnson: "Any statement I made to any of you that any of you took offense to I express my regrets & or hereby retract same." On the same date, he had his attorney to prepare a deed to the property and the same was left in the hands of W. H. Cox that day

In a lengthy letter dated March 5, 1957, J. B. Hutton, Jr., among other things, advised Sam that he would have to pay over cash in exchange for the deed. On the same date Mrs. Johnson wrote Sam as follows: "Before Mary Ryburn, Jim and I confirm in writing any terms offered since the letter sent to you on March 2, 1957, and signed by the three of us, it will be necessary for you to comply with the requirement of the letter sent to you on the same day, by the same messenger, and signed by Jim and me.

"Mary Ryburn, Jim and I have agreed that every binding term or condition of any proposed business transaction between you and us must be in writing.

"Until you receive further written terms from the three of us the proposition stands as of our letters of March 2, 1957." On the next day, Mrs. Johnson wrote Sam again as follows: "I received today, your note of March 4, 1957.

"The letter sent to you on March 2, 1957 by Jim and me was very specific. It applied to, and specified, a definite time, place and persons.

"I refer you once again to our letter of March 2, for the note I received from you today does not fulfill its requirements."

On March 6, 1957, Sam wrote the defendants at Jackson, Mississippi, as follows: "This is to acknowledge receipt of your letter of March 2, 1957.

"I hereby accept your offer as set forth in this letter.

"Upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday, March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00, and also a cashiers check for $3,200.00 to cover rent for 1956 and for 1957.

"Please have Mr. Cox notify me by telephone at 4071 Tchula (Collect) when he is ready for me to deliver checks."

On March 8, 1957, Sam wrote Mrs. Johnson and J. B. Hutton, Jr., at Jackson, Mississippi, as follows: "In regards to your letter of March 2, 1957, which was delivered to me by Russ at Canton, and for which I suppose you have a copy.

"This is my written expression of regret for and retraction of the statements I made o Mary Ryburn and Charlton on March 1, 1957." Mrs. Johnson, on March 9, 1957, acknowledged receipt of this letter as follows: "Your letter of March 8, 1957, was received this morning.

"I have sent it, along with your first registered letter which was received earlier in the week, to Jim.

"As Mary Ryburn is here in Jackson at present, she has already had the opportunity to read these two letters from you.

"When Jim has had the same opportunity you may expect a written reply from the three of us."

In regard to the preparation of the deed, Mrs. Johnson, on March 20, 1957, wrote Sam as follows: "In my most recent letter from Jim, which came yesterday, he suggested that I write a note to you to let you know that we are working on the terms of a deed based on the offer you made to purchase his, my and Mary Ryburn's parts of the Cooper Place.

"When this work is done, we will of course send a copy to you that you too can review it and give it your careful consideration.

"I hope that you and yours are well—" In another letter to him, of date of April 13, 1957, she said: "We

are sending you a copy of the draft of a deed to Mother's part of the Cooper Place upon which we have been working for sometime, as you already know.

"Jim, Mary Ryburn, and I have given it our careful thought, consideration and approval. We are sending it to you now for your review and consideration. We are also sending a photo of the map of the place.

"If you approve the deed, or if you wish to make changes for our further consideration, please return both the deed and the map directly to Jim or to me. If you desire any other correspondence regarding the deed, please also send that directly to one of us.

"A copy of the deed has been sent to Susan and she has been asked to give her views, as has Charlton. Until we hear from them we cannot say finally whether the option provided in the deed, for a survey of mineral boundaries with a description and plat shall be exercised now and made a part of the deed, or whether this shall be done later.

"In order to avoid further delay, we are sending this draft of the deed to you for your consideration, while Susan and Charlton also have it before them for the same purpose.

"When, and if, we have the unanimous consent of all parties concerned, Jim will draw the final draft with acknowledgments.

"I trust you and your family are well."

On April 17, 1957, Sam received through the mail what was denominated as "Agreement and Warranty Deed Covering Rent and Exception Therefrom of Minerals in Place Thereunder", together with a plat of the property. The instrument covered six cap sized pages, written in

single space, and intended for execution by the three defendants, by the complainant, and also by Charlton D. Hutton and Susan Van Houten Smith, as devisees of mineral rights.

On May 20, 1957, Mrs. Johnson wrote Sam as follows: "Mary Ryburn, Jim and I want to know immediately if you have any further interest in the proposed sale of the land in Mother's part of the Cooper Place." And again on May 25, 1957, she wrote to inform him as follows: "Our offer to sell to you Mother's part of the Cooper Place expires five days from the date of this letter—"

Sam testified that, on May 30, 1957, he wrote the defendants at Jackson, Mississippi, the following letter: "I acknowledge receipt of your letter of May 25, 1957.

"I hereby reaffirm my acceptance of your offer as set forth in your letter of March 2, 1957.

"I hereby reject your Agreement and Warranty deed in draft form sent me under separate cover about April 17, 1957, and deny that it in any way complies with your offer as set forth in your letter of March 2, 1957." The defendants denied that they received the letter.

On May 31, 1957, Mrs. Johnson wrote Sam as follows: "In view of your failure to acknowledge all previous correspondence since April 13, 1957 and in view of your failure to reply to all inquiries during this same period of time, as well as your failure to comply with the stipulated conditions for completing the proposed sale of the land in Mother's part of the Cooper Place, we are unwilling to hold the proposals open longer. You are hereby thus informed. The proposal is dropped. We do not want to reopen it or to attempt further negotiations."

At the conclusion of the evidence, the learned Chancellor prepared and delivered a written opinion. He held that the defendants' offer of March 2, 1957, was to sell for $30,000 cash and the payment of the rent notes for 1956 and 1957; but that the complainant's letter of acceptance stated that, upon the execution of the deed which he had left with Mr. Cox, he would deliver to Mr. Cox a cashier's check for $30,000 for the deed and a like check for $3,200 to cover the rent for 1956 and 1957. Holding that a cashier's check is not actually cash, the Chancellor concluded that the acceptance was not in strict accordance with the terms and conditions of the offer, and that it amounted to a counter proposal or rejection of the offer. For that reason, he declined to decree specific performance. At the same time, he also referred to the fact that the deed and escrow agreement, which had been left with Mr. Cox, made no mention of the payment of the two rent notes in the sum of $3,200 for the years 1956 and 1957. In the suit which had been filed by J. B. Hutton, Jr., as executor, against Sam for the recovery of the *rent notes*, and which had been transferred from the circuit court to the chancery court and consolidated with the specific performance action, he awarded a *decree for the rent and interest and attorney's fees.*

From the final decree, Sam appealed.

The appellant contends that the decree, denying specific performance, based on the finding of the chancellor, is manifestly wrong because, he says, the offer, made by the appellees in their letter of March 2, 1957, was unequivocably accepted by his letter of March 6 thereafter; that the offer to sell the property "for $30,000 cash" meant a cash sale as distinguished from a sale on terms or credit, and did not mean that the appellees were each to be

actually paid by the appellant in specie or currency; and that the third paragraph of his letter with reference to the execution of the deed, left with Mr. Cox, and the delivery of cashier's checks for the consideration and for the payment of rent, were mere suggestions or requests looking to the expedition of the performance of the consummated contract.

On the contrary, the appellees say that the acceptance was not effected; that it introduced new terms and constituted a counter-offer, and therefore amounted to a rejection; that a cashier's check is a substantial variance from the term "cash" as used in the offer; that the appellant in fact abandoned the proposed contract; and that he was not entitled to specific performance on account of subsequent inequitable conduct.

It is definitely settled that the words of a contract should be given a reasonable construction, and that courts "must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles". See *Rubel et al., Executors*, v. *Rubel*, 221 Miss. 848, 75 So.2d 58, and the authorities there cited.

This Court, in *Welch* v. *Williams*, 85 Miss. 301, 37 So. 561, observed that the general rule, in reference to the enforcement of specific performance of contracts, is that "the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties had met and mutually agreed as to all its details upon the offer made, upon the one hand, and accepted, upon the other. If any of these requisites be lacking, specific performance will not be decreed by a court of equity." This rule was reaffirmed in *Phip* v. *Dana*, 121 Miss. 697, 83 So. 745, and

Fowler v. *Nunnery*, 126 Miss. 510, 89 So. 156. See also 12 Am. Jur., Contracts, Sec. 53, pp. 543-544; Williston on Contracts, Secs. 72 and 76, pp. 127 and 132.

Beyond question, the appellees, by their letter of March 2, 1957, made an *unconditional offer to sell* to appellant, by warranty deed, their rights in the 507 acres of land, more or less, devised to them by the will of their mother, for $30,000 cash, with an express reservation to them of their mineral rights as given in the will. Besides, their demand as to payment of the 1956 and 1957 rent and their assumption of 1957 taxes were clearly stated. They thereby agreed to hold this offer open for two weeks and to give appellant the *right* to accept or decline by letter within that period of time. The offer was certainly clear and unambiguous; and, if it was accepted in the manner required, the contract was binding on all of the parties. *Holifield* v. *Veteran's Farm & Home Board*, 218 Miss. 446, 67 So.2d 456.

There was every reason for the court to do so, and it found that the required apology was adequate and sufficient.

The question is whether Sam's language, to-wit, "upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00 and also a cashiers check for $3,200.00 to cover rent for 1956 and 1957" constituted a counter-offer and therefore amounted to a rejection of the appellees' offer, or whether it was simply a suggestion to expedite the performance of the consummated contract.

In Williston on Contracts, Vol. 1, Sec. 79, p. 261, it is said: "Frequently an offeree while making a positive acceptance of the offer, adds as a request or suggestion that

some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed." See also 91 C.J.S., Vendor & Purchaser, Sec. 31b, p. 882, where it is said: "If an offer is accepted as made, the acceptance is not qualified or conditional because of the expression of a hope, request, or suggestion, or because of the insertion of an immaterial variation or condition."

In *Crenshaw Bros. Seed Co. v. Rauch*, 112 Miss. 330, 73 So. 58, the appellee and appellant, by correspondence, had agreed to sell and purchase, respectively, 450 bushels of peas, f.o.b. Tampa, Florida; and the appellant, by letter, confirmed its agreement to purchase the peas, "if first-class stock". The appellee had shipped 175 bushels of the peas before the receipt of the above mentioned letter. But because the communication called for "thoroughly clean peas and first-class stock", the appellee, according to his version, considered the contract canceled as he had not sold that grade of goods. This Court, in holding that the appellant was entitled to a peremptory instruction for such damages as it sustained, said: "If the sort of peas mentioned in the plaintiff's letter were not the kind stipulated for in the original contract, the appellee could have insisted on the appellant standing by the contract and receiving the peas contracted for. The appellant received and paid for one hundred and seventy-five bushels of the peas contracted for, and the appellee could not relieve himself from his contract without offering to carry it out under the terms as originally stipulated. The appellee not only failed to tender a performance of his part of the contract, but repudiated the contract by a positive refusal on his part to carry it out." See also *Turner v. McCormick*, 67 L.R.A. 353, a West Virginia case; *Martindale v. Fiduciary*

Counsel, 26 A.2d 171; 30 A.2d 281, a New Jersey case; *Skinner* v. *Stone*, 222 S.W. 360, an Arkansas case; *Rucker* v. *Sanders*, 109 S.E. 857, a North Carolina case; *Whelchel* v. *Waters*, 111 S.E. 25, a Georgia case; *Corner* v. *Britt*, 85 S.E.2d 888, a North Carolina case; *Valashines* v. *Komuto*, 124 N.E.2d 300, a New York case; *Horgan* v. *Russell*, 140 N.W. 99, a North Dakota case.

For instance, in *Martindale* v. *Fiduciary Counsel*, *supra*, it was said that "A good acceptance of an offer makes the 'contract' even if there is added to the acceptance a proposal relative to fulfillment of the contract." Likewise in *Horgan* v. *Russell*, *supra*, it was held that a demand, in the instrument of acceptance, which pertained not to the acceptance but to the performance thereof, did not invalidate the acceptance. To the same effect is *Skinner* v. *Stone*, *supra*, where the appellee, by his letter of July 5, accepted appellant's proposition, contained in his letter of June 28. The opinion said that the statement about sending the draft to the Merchants' & Farmers' Bank was not an additional and unagreed upon condition, but was a mere suggestion to expedite the consummation of a contract which the letter itself closed by accepting unconditionally appellant's offer to sell.

The appellees evidently understood Sam's letter of March 6, 1957, to be an acceptance of their offer. Their letters of March 20 and April 13 are convincing evidence to that effect. The deed, which Sam had proposed, obviously did not meet their approval because they thereafter submitted their own form to him for review and consideration. At no time did they make any objection whatever to his suggestion of payment of the consideration and the rent by cashier's checks. *The time for actual performance by the appellant in the delivery of the considerations*

never did arrive. Before the form of deed was agreed upon, the appellees repudiated their agreement.

As heretofore stated, the deed, which the appellees tendered, was prolix in form. Besides, it contained extraneous matters, and did not conform to the written offer to sell. It no doubt was the obstacle upon which the consummation of the contract foundered.

Appellees say that *Fowler* v. *Nunnery, supra*, is decisive in their favor in this case. But in that case, Fowler, living at Picayune, replied to Nunnery, living at Magnolia, "I will take fifteen hundred dollars cash for the land I own near Chatawa; this is net cash." Nunnery, in reply, said: "Mr. W. C. Fowler, Picayune, Miss. Dear Sir: Replying to your letter of the 2d inst., I accept your property at Chatawa, and herewith inclose deed for same, to which you will attach draft for fifteen hundred dollars and send same to the Citizens' Savings Bank, Magnolia, Miss., for collection." The opinion specifically pointed out and emphasized these facts: (1) The offer to sell was for net cash; (2) Nunnery's letter was not an unqualified acceptance of that offer; (3) In the previous correspondence, nothing had been said about whose duty it was to draft the deed; (4) The offer to sell was silent as to the nature and character of the deed which Fowler would make, whether quitclaim, or a special or general warranty; (5) Nunnery assumed the duty and wrote a deed; (6) This deed contained more land than Fowler owned and the description was also erroneous; (7) When Nunnery asked Fowler to sign the deed, he did not tender to him in cash the consideration, but instructed him to draw a draft on a bank at Magnolia, Mississippi; and (8) Since Fowler was required to send the deed to another town for collection, because it was not accompanied by a tender of the consideration in

cash, the offer of sale was not accepted according to its terms.

That case is unlike the one on the present appeal. *Here the appellant made an unqualified acceptance of the appellees' offer.* The appellees had agreed to sell their rights "by warranty deed". The appellant, showing his full purpose to comply with the terms of a cash, rather than a credit, sale, suggested that he would deliver for the deed cashier's check for the consideration of $30,000 and the rent of $3,200; and Mr. Cox lived in the City of Jackson, where Mrs. Johnson, the apparent spokesman of the defendants, also lived. It is clear that the contract in this case failed of performance on account of disagreement as to the terms of the deed, when, under the contract, there was no room for any substantial difference of opinion.

The appellees' offer to sell the property for $30,000 cash was *an offer of a cash sale* as distinguished from a sale on credit. "Cash" is the antonym of "Credit". See *Lee* v. *Cutrer*, 96 Miss. 355, 51 So. 808. In that case, Article 3 of the charter of the Bank provided: "The stock of said corporation may be paid for in cash or in monthly installments, or on check as the board of directors may from time to time direct, and the board of directors shall have the right to provide for the issuance of stock as payments are made and may receive payments in full of all stock subscribed for from any subscriber on such terms as may be fixed by general order of the board of directors." The appellee paid for his stock with a fee of $250 for services in the organization and the agreed price for furniture and fixtures in the amount of $1,750. The Court said that it was manifest that the word "Cash" was used "not to designate the medium of payment, but as a term meaning the opposite of credit," and that the appellee had paid his subscription to the capital stock of the bank in

full. See also *Van Decar* v. *Streeter*, 240 N.Y.S. 492, a New York case; *Duprey* v. *Donahoe*, 323 P.2d 903, a Washington case; *Parrish* v. *American Railway, etc., Corp.*, 256 Pac. 590, a California case; *McInnis* v. *Brown County*, 41 S.W.2d 741, a Texas case; *State* v. *Woodward*, 93 So. 826, an Alabama case; and *Palliser* v. *United States*, 136 U.S. 257, 34 L. Ed. 514.

The appellees, from their offer, did not expect to sell the land to the appellant on a credit. *The sale had to be a cash transaction*, that is, for "ready money or money in hand; either in current coin or other legal tender, or in bank bills or checks paid and received as money." *Palliser* v. *United States*, *supra*. According to the appellant's suggestion, when the deed had been executed, he would deliver the cashier's checks to Mr. Cox, whose office was in the City of Jackson. While a cashier's check is of course not currency, it represents, as a general proposition, ready money as distinguished from an ordinary credit. *Undoubtedly* the appellees did not contemplate that the appellant should, simultaneously with the delivery of the deed, produce coin and *currency* of the realm and actually pay the same over to them. *But if they did so intend, the appellant would have had the right to conform thereto at the time of the exchange.* Actually, however they at no time raised any question as to his suggested mode of payment.

In 92 C.J.S., Vendor & Purchaser, Sec. 252a, p. 117, it is said that "The purchaser is excused from payment if performance on his part is prevented by the conduct or interference of the vendor", and under paragraph b. thereof, p. 119, that "the purchaser is generally not bound to go forward with performance on his part as long as the vendor is in default with respect to acts required of him by the terms of the contract." *Mrs. Johnson's letter of May 31, 1957, brought the negotiations to an end.*

Obviously the only thing that would *bar* the *appellant* is the *statute of limitations*. But, since the suit was filed July 23, 1958, there was of course no bar of the action.

Appellees further say that appellant was guilty of inequitable conduct on account of the fact that, subsequent to the contract, he appealed on behalf of his minor daughter to the Supreme Court from a decree of the Chancery Court of Hinds County, in the case of *Hutton* v. *Hutton*, 233 Miss. 458, 102 So.2d 424, and thereby *attacked the title of Mrs. Johnson;* and besides, that he was *in default in the payment of rents.*

But the suggested deed, which appellant had his attorney to prepare, expressly provided in one paragraph thereof as follows: *"The undersigned Rosalind Hutton Johnson is the same person as 'Rosalind Gwin Hutton' mentioned in Part I of Item III of said Last Will and Testament" of Mrs. Rosalind Gwin Hutton.* It was under that part of the will that Mrs. Johnson received her request to the 169 acres that she purposed to convey. *The acceptance of a deed with that or a similar provision instead of constituting an attack on Mrs. Johnson's title would have clearly amounted to an admission of her title.* Besides when the appellant, on May 2, 1957, perfected the appeal, he did so not for himself but for the protection of the interest of his minor daughter. He evidently acted under the advice of learned counsel. The question on that appeal was *not* so devoid of merit as to constitute *inequitable conduct* on the part of the appellant in submitting the matter for review and final decision by the Court.

Neither did the appellant's *default* in the payment of rent make his conduct *inequitable because* the discharge of that obligation was fully provided for in the contract of sale and purchase.

Manifestly the court was in *error both* in declining to decree specific performance of the contract and in awarding judgment against the appellant *for the rent, interest thereon, and attorney's fees.* If specific performance had been required, simultaneously with the consummation of the contract, the obligation for rent would have been paid and discharged in accordance with the terms of the contract. Consequently the cause must be reversed and remanded, and the trial court is *directed to decree and enforce specific performance by each and every party to the contract of each and every act and thing necessary and proper for the full consummation of the contract in accordance with the terms and provisions thereof.*

REVERSED AND REMANDED WITH DIRECTIONS.

ALL JUSTICES CONCUR EXCEPT ROBERDS, HOLMES AND ARRINGTON, JJ., WHO TOOK NO PART

SUPREME COURT OF MISSISSIPPI

FINAL ORDERS AND DECREES UNDER REVIEW.

(R. 441, 487.)

Monday, April 4, 1960. Court Sitting

S. D. G. Hutton,

41,428 vs.

J. B. Hutton, Jr., Executor of Estate of
Mrs. Rosalind Gwin Hutton, Deceased.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Holmes County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 14th day of March, 1959-be and the same is hereby reversed and the trial court is directed to decree and enforce specific performance by each and every party to the contract in litigation of each and every act and thing necessary and proper for the full consummation of said contract in accordance with the terms and provisions thereof. It is further ordered and adjudged and decreed that the appellant do have and recover of and from the appellees all of the costs of this appeal to be taxed, etc.

Minute Book "BM" page 142 (R. 441).

Monday, May 2, 1960. Court Sitting.

S. D. G. Hutton,

41,428 vs.

J. B. Hutton, Jr., Exec. Etc., et al.

This cause this day came on to be heard on the suggestion of error, the supplemental suggestion of error and im-

plementing motion filed herein and this Court having sufficiently examined and considered the same and being of the opinion that they all should be overruled doth order and adjudge that said suggestion of error, the supplement to the suggestion of error and the implementing motion, be and they are each and all overruled.

Minute Book "BM" page 158 (R. 487).

SUPREME COURT OF MISSISSIPPI

(Monday, July 11, 1960.)

S. D. G. Hutton,

No. 41,428

J. B. Hutton, Jr., Et Al.

This cause this day came on to be heard on the Motions of the appellees filed in this Court on the 28th day of June, 1960, and this Court having sufficiently examined and considered said motions and being of the opinion that the same should be overruled doth order and adjudge that said motions be and the same are hereby overruled.

(Record, p. 497.)